FILED

No. 95 673 OCT 23 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

Pete Wilson, Governor of the State of California; Bill Jones, Secretary of State, California; Frank Zolin, Director of the California Department of Motor Vehicles; Eloise Anderson, Director of the California Department of Social Services; Brenda Premo, Director of the California Department of Rehabilitation,

Petitioners,

vs.

Voting Rights Coalition; Coalition for an African-American Community Agenda; League of Women Voters of California; California Common Cause; '94 Committee; Stella Dominquez; Cynthia Moreno; and Veronica Moreno,

Respondents.

Pete Wilson, Governor of California; State of California,

Petitioners,

vs.

Janet Reno, U.S. Attorney General; United States of America,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of the State of California

FLOYD D. SHIMOMURA
Senior Assistant Attorney General
CYRUS J. RICKARDS
Deputy Attorney General*
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5494

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This case arises from California's Tenth Amendment challenge to the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*, popularly known as the "Motor Voter" Act, which was purportedly enacted pursuant to Congress's power under Article I, section 4 of the U.S. Constitution, which authorizes it to regulate the time, place and manner of federal elections. The Act requires state agencies and employees, whose responsibilities under state law were heretofore unrelated to the administration of elections, to administer a federal voter registration program. This petition presents this Court with an unusual opportunity to address several important, unsettled issues of federalism, including – for the first time – the extent of the Tenth Amendment's restraint on Congress's Article I powers other than the Commerce Clause; the reach of this Court's decision in *New York v. United States*, 505 U.S. 144 (1992); and the extent to which Congress may exercise its Article I power to conscript state agencies and employees whose responsibilities were heretofore unrelated to the federal statutory program that they are now being required to administer. Specifically, this petition presents the following questions:

1. Whether the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*, violates the Tenth Amendment of the U.S. Constitution by directing the States to designate state agencies "as voter registration agencies" and by commandeering state employees, whose responsibilities

QUESTIONS PRESENTED – Continued

were heretofore unrelated to voter registration, to administer a federal voter registration program.

2. Whether Article I, section 4 of the U.S. Constitution, which authorizes the Congress to "make or alter" regulations as to the time, place, and manner of holding elections for Senators and Representatives, should be construed, in deference to the concept of federalism embodied in the Tenth Amendment, so as not to empower Congress to commandeer state agencies and state employees, whose responsibilities are unrelated to the administration of state election laws, to administer the federal voter registration program required by the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*

3. If Article I, section 4 does not empower Congress to enact the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*, then whether the Fourteenth and Fifteenth Amendments to the U.S. Constitution grant Congress the power to commandeer state agencies and state employees, whose responsibilities are unrelated to the administration of state election laws, to administer the federal voter registration program required under the Act. This last issue was fully briefed, but not reached, in the court below.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

This proceeding consists of two consolidated actions.

In the first action (district court case no. C-94-20860 JW), the plaintiffs (respondents herein) are: the Voting Rights Coalition; Coalition for an African-American Community Agenda; League of Women Voters of California; California Common Cause; '94 Committee; Stella Dominquez; Cynthia Moreno; and Veronica Moreno. The defendants (petitioners herein) are: California Governor Pete Wilson; Bill Jones, Secretary of State of California; Frank Zolin, Director of the California Department of Motor Vehicles; Eloise Anderson, Director of the California Department of Social Services; and Brenda Premo, Director of the California Department of Rehabilitation.

The second action (district court case no. 95-20042-JW) was brought by California Governor Pete Wilson and the State of California (petitioners herein) against Janet Reno, U.S. Attorney General; the United States of America; Trevor Potter, Chairman, Federal Elections Commission; and the Federal Elections Commission. Trevor Potter and the Federal Elections Commission were dismissed by the district court and were not before the Court of Appeals; thus, they are not parties herein, and they have no interest in this petition.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

A. The Provisions Of The National Voter Registration Act 4

1. The Department of Motor Vehicles' New Voter Registration Duties 4

2. The Social Service Agencies' New Voter Registration Duties 5

3. The Designation of A Chief Election Official 6

4. Financial Effects of the Act in California ... 7

B. The Proceedings Below 7

1. The Governor's Executive Order 7

2. The District Court Proceedings and the Basis for Jurisdiction in the District Court 8

3. The Appeal to the Ninth Circuit 9

4. Other States' Challenges to the Motor Voter Act 10

TABLE OF CONTENTS – Continued

Page

REASONS FOR GRANTING THE PETITION 11

A. This Court Should Settle Whether The Ruling in *New York v. United States* Is Limited To Congress's Exercise Of Power Under The Commerce Clause..... 14

B. This Court Should Settle The Important Question Of Whether The Tenth Amendment Prohibits Congress From Conscripting Into The Service Of The Federal Government State Employees And Agencies Whose Responsibilities Are Unrelated To The Article I Power Which Congress Is Exercising..... 18

1. The Extent To Which Congress May Conscript State Employees Is Unsettled 18

2. Federal Conscripting of State Employees Raises Issues of Political Accountability Upon Which Our Federal System Rests... 23

C. Alternatively, This Court Should Decide The Important Question Whether Article I, Section 4 Of The Constitution Authorizes Congress To Commandeer State Employees And Agencies Whose Responsibilities Are Unrelated To The Administration Of State Election Laws..... 24

D. This Case Also Raises The Question Whether Either The Fourteenth Or Fifteenth Amendment Grants Congress The Power to Enact The National Voter Registration Act..... 27

CONCLUSION 29

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995) ... 10, 11, 17

Bowen v. American River Hospital Assn., 476 U.S. 610 (1986) ... 20

Buckley v. Valeo, 424 U.S. 1 (1976) ... 26

City of Rome v. United States, 446 U.S. 177 (1979) ... 28

Commonwealth of Virginia v. United States, Civil Action No. 3:95CV357 (RLW) (U.S.D.C., E.D. Va.) ... 11

Condon v. Reno, Civ. Action No. 3-95-192-0 (U.S.D.C., D.S.C.) ... 11

Coyne v. Smith, 221 U.S. 559 (1911) ... 19

Ex Parte Siebold, 100 U.S. 371 (1879) ... 25

Ex Parte Virginia, 100 U.S. 339 (1880) ... 28

Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982) ... 19

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) ... 26

Gregory v. Ashcroft, 501 U.S. 452 (1991) ... 11, 25

Kentucky v. Dennison, 24 How. 66, 107, 16 L.Ed. 717 (1861) ... 19

Mack v. United States, 1995 U.S. App. Lexis 25263 (9th Cir. 1995) ... 13, 17, 21, 22

McCulloch v. Maryland, 17 U.S. 316 (1819) ... 18

TABLE OF AUTHORITIES – Continued

Page

National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled, Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) 11

New York v. United States, 505 U.S. 144 (1992) ... *passim*

Oregon v. Mitchell, 400 U.S. 111 (1970) 29

South Dakota v. Dole, 483 U.S. 203 (1987) 19

State of South Carolina v. Katzenbach, 383 U.S. 301 (1966) 28

United States v. Lopez, ___ U.S. ___, 131 L.Ed.2d 626 (1995) 11, 23, 25

United States v. Reese, 92 U.S. 214 (1875) 28

Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995) ..... *passim*

Wilson v. United States, 878 F. Supp. 1324 (N.D. Cal. 1995) 9

CONSTITUTIONAL PROVISIONS

United States Constitution

art. I 12, 18, 22, 27, 29

art. I, § 4 ..... *passim*

Tenth Amendment ..... *passim*

Fourteenth Amendment 2, 14, 27, 28

Fifteenth Amendment 2, 14, 27, 28, 29

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C.

§ 1254(1) 1

§ 1291 9

§ 1331 8

§ 1345 8

§ 2201 8

National Voter Registration Act, 42 U.S.C.

§ 1973gg *et seq.* 2, 3

§ 1973gg-3 2

§ 1973gg-3(c)(1) 4

§ 1973gg-3(c)(2) 4

§ 1973gg-3(d) 5

§ 1973gg-3(e) 5

§ 1973gg-5 ..... 15, 16

§ 1973gg-5(a) 5

§ 1973gg-5(a)(1) 3, 14, 16

§ 1973gg-5(a)(2) 3

§ 1973gg-5(a)(3)(B) 6

§ 1973gg-5(a)(4) 3, 6

§ 1973gg-5(a)(4)(B) 6

§ 1973gg-5(a)(6)(B) 6

§ 1973gg-5(c) 6

TABLE OF AUTHORITIES – Continued

Page

§ 1973gg-5(d) 6

§ 1973gg-8 ..... 6, 15, 16

§ 1973gg-9 8

§ 1973gg-9(a) 8

COURT RULES

Federal Rules of Civil Procedure

Rule 65(a)(1) 9

REGULATIONS

59 Fed.Reg. 32,311, 32,316 (Jan. 23, 1994) 5

OTHER AUTHORITIES

The Federalist No. 59 26

Pete Wilson, Governor of the State of California; Bill Jones, the California Secretary of State; Frank Zolin, Director of the California Department of Motor Vehicles; Eloise Anderson, Director of the California Department of Social Services; Brenda Premo, Director of the California Department of Rehabilitation; and the State of California respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 60 F.3d 1411. The opinion of the district court is reported at 878 F. Supp. 1324.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit from which review is sought was entered on July 24, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the following constitutional and statutory provisions:

Article I, section 4 of the U.S. Constitution provides:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

The Tenth Amendment of the U.S. Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[1]

The National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*, is the statute whose constitutionality is challenged in this proceeding. One relevant section requires state motor vehicle agencies to serve as voter registration agencies and requires driver's license applications and renewals to be modified to serve as voter registration applications. 42 U.S.C. § 1973gg-3. Another relevant section provides:

> "(1) Each State shall designate agencies for the registration of voters in elections for Federal office.
>
> (2) Each State shall designate as voter registration agencies –
>
> (A) all offices in the State that provide public assistance; and
>
> (B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.
>
> * * *
>
> (4)(A) At each voter registration agency, the following services shall be made available:
>
> (i) Distribution of mail voter registration application forms in accordance with paragraph (6).

---

[1] The full text of the Fourteenth and Fifteenth Amendments, which will only be addressed if this Court decides the third question presented, are set forth in the Appendix.

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official."

42 U.S.C. § 1973gg-5(a)(1), (2) and (4).

The full text of this Act is set forth in the Appendix.

STATEMENT OF THE CASE

This proceeding arises out of California Governor Pete Wilson's challenge to the National Voter Registration Act, popularly known as, and hereinafter referred to as, the "Motor Voter" Act, 42 U.S.C. § 1973gg *et seq.*, which requires that the States designate certain state agencies to assist with, and process applications for, voter registration for federal elections.

The Governor claims that the Act is an unconstitutional exercise of Congress's authority under Article I, section 4 of the U.S. Constitution and violates the Tenth Amendment because it commandeers state agencies and employees, which heretofore had nothing to do with the administration of election laws, to administer a federal voter registration program. Unlike this Court's other recent cases which address the Tenth Amendment's restraint on the Congress's Commerce Clause power, this challenge raises the issue of the Tenth Amendment's constraint on another Article I power (Article I, section 4). It also squarely addresses the scope of the federal government's right to conscript state employees to administer a

federal program when that program is totally outside the scope of their state-designated responsibilities.

A. The Provisions of The National Voter Registration Act

As stated by the Ninth Circuit in the opinion below, the National Voter Registration Act is "a complex statute of ten sections bearing the marks of legislative draftsmanship similar to those borne by the Internal Revenue Code." *Voting Rights Coalition v. Wilson*, 60 F.3d at 1413.

Under the Act, every state is required to designate certain state agencies, including its Department of Motor Vehicles and local welfare offices, as federal voter registration agencies. These agencies are required to prepare new voter registration forms for federal elections, assist in the registration of applicants for driver's licenses or social service benefits (to the point of home assistance for the disabled), and process the forms within ten (10) days or less.

1. The Department of Motor Vehicles' New Voter Registration Duties

Under Section 5 of the Act, each state shall "include a voter registration application form for elections for Federal office as part of an application for a State motor vehicles driver's license." 42 U.S.C. § 1973gg-3(c)(1). The voter registration application "may not require any information that duplicates information required in the driver's license portion," and "may require only the minimum amount of information necessary" to enable state officials to assess the eligibility of the applicant. 42 U.S.C. § 1973gg-3(c)(2). These provisions have been construed by respondents to prohibit even inquiry of the place of

birth or a verification of the applicant's citizenship beyond a simple attestation. *See, e.g.*, 59 Fed.Reg. 32311, 32316 (Jan. 23, 1994).

Any change of address submitted in connection with a driver's license must also serve as a change of address for voter registration purposes in federal elections unless the registrant states otherwise. 42 U.S.C. § 1973gg-3(d).

Finally, the Department of Motor Vehicles must process the completed voter registration portion of the application and transmit it to the appropriate state election officials not later than ten days after the date of acceptance, and in some circumstances within five days. 42 U.S.C. § 1973gg-3(e).

The Department of Motor Vehicles estimates that in order to provide the voter registration services required by the Act and maintain existing levels of service, fifty-eight additional full-time employees will be required statewide at a cost exceeding $1.7 million. Prior to the imposition of these new voter registration duties, wait times at Department of Motor Vehicles offices in large urban centers already exceeded thirty minutes.

2. The Social Service Agencies' New Voter Registration Duties

Under Section 7 of the Act, 42 U.S.C. § 1973gg-5(a), "[e]ach State shall designate agencies for the registration of voters in elections for Federal office." These include "all offices in the State that provide public assistance," "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities", and "other offices within the State," such as public libraries, public schools, unemployment compensation offices, and government revenue offices. It

may also designate "Federal and nongovernmental offices, with the agreement of such offices." 42 U.S.C. § 1973gg-5(a)(3)(B).[2]

These voter registration agencies must make the following services available: distribution of a new federal voter registration application with each application for the agency's services or with any change of address; transmittal of a form inquiring about the applicant's interest in registering and advising them of various rights; "[a]ssistance to applicants in completing voter registration application forms, *unless* the applicant refuses such assistance" [emphasis added]; and "[a]cceptance of completed voter registration application forms for transmittal to the appropriate State election official." 42 U.S.C. § 1973gg-5(a)(4) and (a)(6)(B).

Moreover, if the office provides services to a disabled person at that person's home, "the agency shall provide the [voter registration] services . . . at the person's home." 42 U.S.C. § 1973gg-5(a)(4)(B).

Each agency must process and transmit the completed registration applications not later than ten days after the date of acceptance, or in some circumstances, within five days. 42 U.S.C. § 1973gg-5(d).

3. The Designation of A Chief Election Official

Under Section 10 of the Act, 42 U.S.C. § 1973gg-8, each State "shall designate a State officer or employee as

---

[2] The state is also obligated to work with the Secretary of Defense to jointly develop and implement procedures so that persons may apply to register to vote at recruitment offices of the United States Armed Forces. 42 U.S.C. § 1973gg-5(c).

the chief State election official to be responsible for coordination of State responsibilities" under the Act.

4. Financial Effects of the Act in California

The State of California has estimated that the annual cost to the State of implementing this Act, over and above any federal funding, is at least $18 million. (Respondents did not present any admissible evidence to contest this figure in the lower courts.)

Moreover, federal financial assistance appears to be limited to a postal discount for mailings and an announcement by the Department of Health and Human Services that voter registration assistance to AFDC clients will be reimbursable at the normal administrative match rate of fifty percent (50%).

Implementation of the Act will also require the State to revise, in wholesale fashion, the California Elections Code in order to conform state registration law with the new requirements for registration for federal elections. Indeed, the State will have to either conform its own state registration procedures for *state* elections with the Act's federal requirements for federal elections or go to the extraordinary expense of having separate voter registration rolls for state and federal elections.

B. The Proceedings Below

1. The Governor's Executive Order

By executive order dated August 12, 1994, Governor Wilson designated various state agencies as federal voter registration agencies as required by the Act. He directed the agencies to implement the Act – but only to the extent federal funding was made available for such purposes.

2. The District Court Proceedings and the Basis for Federal Jurisdiction in the District Court

On December 15, 1994, certain respondents – the Voting Rights Coalition and others[3] (the "Voting Rights Coalition plaintiffs") – brought this action for declaratory and injunctive relief in the U.S. District Court for the Northern District of California pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1973gg-9, seeking enforcement of the Act.

On December 20, 1994, petitioners – Governor Wilson and the State of California – brought their own action against the United States; U.S. Attorney General Janet Reno; the Chairman of the Federal Elections Commission; and the Federal Elections Commission (the "federal respondents") for declaratory and injunctive relief pursuant to 28 U.S.C. § 1331, seeking to enjoin enforcement of the Act, in whole or in part, on the grounds that the Act violated the Tenth Amendment.

The federal respondents thereafter answered and brought a counterclaim against Governor Wilson, the State of California, and the California Secretary of State for declaratory and injunctive relief, seeking to enjoin petitioners from refusing to comply with the Act pursuant to 28 U.S.C. §§ 1331, 1345 and 2201 and 42 U.S.C. § 1973gg-9(a), the latter of which authorizes the "Attorney General . . . [to] bring a civil action in an appropriate

---

[3] The other parties were the Coalition for an African-American Community Agenda, League of Women Voters of California, California Common Cause, '94 Committee, Stella Dominquez, Cynthia Moreno, and Veronica Moreno.

district court for such declaratory or injunctive relief as is necessary to carry out this subchapter."

The district court consolidated the two actions. The petitioners, the federal respondents, and the Voting Rights Coalition plaintiffs filed motions for preliminary injunction, seeking to enforce or to enjoin enforcement of the "Motor Voter" Act. On February 17, 1995, the district court consolidated the hearing of the preliminary injunction motions with the trial on the merits pursuant to Rule 65(a)(1), Fed. R. Civ. P., and set the hearing date for March 2, 1995.

At the conclusion of the hearing, the U.S. District Court issued a permanent injunction, entered March 2, 1995, ordering the State of California and Governor Pete Wilson to comply with the Act. Relying solely on *United States v. Manning*, 215 F. Supp. 272 (W.D.La. 1963), for the proposition that the Tenth Amendment does not reduce the powers of the United States, the Court reasoned:

> " . . . Article I, Section 4 specifically states that Congress may make or alter state regulations concerning the time, place and manner of federal elections. Consequently, Congress through the NVRA may directly regulate the state's manner and means of voter registration without invading an area reserved to the states."

Wilson v. United States, 878 F. Supp. 1324, 1328 (N.D. Cal. 1995).

3. The Appeal To the Ninth Circuit

On March 9, 1995, petitioners filed a timely notice of appeal from the district court's injunction. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

In the Ninth Circuit, petitioners again argued that the "Motor Voter" Act violated the Tenth Amendment by

conscripting state agencies and employees to administer a federal regulatory program, citing, in part, this Court's ruling in *New York v. United States*, 505 U.S. 144, 188 (1992), that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

The Ninth Circuit rejected that argument on the grounds that *New York* was decided under the Commerce Clause, whereas the congressional power here was granted under Article I, section 4. The Ninth Circuit then concluded – without citing any authority therefor – that Article I, section 4 empowers the Congress to conscript state agencies:

> "The flaw in the State of California's argument is that it ignores Article I, section 4, which, unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue.
>
> Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation."

Voting Rights Coalition v. Wilson, 60 F.3d at 1415.

4. Other States' Challenges to the Motor Voter Act

In addition to California, four other states challenged the constitutionality of the Motor Voter Act: Illinois, Pennsylvania, South Carolina, and Virginia.

On January 23, 1995, the U.S. Department of Justice sued Illinois and Pennsylvania as well as California for their refusal to implement the Act. *See, e.g., Association of*

Community Organizations for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995). South Carolina and Virginia, like California, sued the federal government. *Condon v. Reno*, Civ. Action No. 3-95-192-0 (U.S.D.C., D.S.C.); *Commonwealth of Virginia v. United States*, Civil Action No. 3:95CV357 (RLW) (U.S.D.C., E.D. Va.).

Although the Seventh Circuit – the only other circuit to rule on the "Motor Voter" Act – rejected Illinois's challenge to the Act, Illinois had primarily challenged the Act on the grounds it altered the qualifications for voters set by the State. *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d at 794-796.

Still, the fact that five states have separately challenged the constitutionality of the Act highlights the serious intrusion on state sovereignty which the Act constitutes. Even the federal government acknowledged in the district court that the Act was an unprecedented conscription of state agencies and employees into the service of the federal government.

REASONS FOR GRANTING THE PETITION

This is the next logical case for this Court to address in its efforts to preserve federalism. All of this Court's recent cases on the subject have addressed the constraint imposed by federalism on Congress's exercise of its Commerce Clause powers. *E.g., United States v. Lopez*, ___ U.S. ___, 131 L.Ed.2d 626 (1995); *New York v. United States*, 505 U.S. 144 (1992); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Even the earlier cases which grappled with federalism – *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled, Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) – addressed the Tenth

Amendment in the context of Congress's Commerce Clause powers.

The instant case gives this Court the opportunity to address whether, and the extent to which, the Tenth Amendment constrains Congress's *other* Article I powers – here, Congress's power under Article I, section 4 to make or alter regulations specifying the time, place and manner of holding federal elections. Both the district court and the Ninth Circuit took the position that "unlike the commerce power in Article I, section 8, [Article I, section 4] empowers Congress to impose on the state precisely the burden at issue." *Voting Rights Coalition v. Wilson*, 60 F.3d at 1415. The lower courts also limited to the Commerce Clause context this Court's unqualified ruling in *New York v. United States*, 505 U.S. 144, 188 (1992), that the "Federal Government may not compel the states to enact or administer a federal regulatory program" – another issue which needs clarification and which this case raises.

Finally, this case presents the unsettled issue of whether Congress has the power under Article I (in this case, under Article I, section 4) to conscript state agencies and employees to administer a federal program that is entirely unrelated to their state-paid duties. In this case, the Motor Voter Act, in an unprecedented expansion of federal power, directs the Department of Motor Vehicles and public assistance agencies, to administer a federal voter registration scheme, although these agencies ordinarily have nothing to do with voting or elections. The Motor Voter Act therefore raises the issue whether Congress's Article I powers authorize Congress to radically alter the nature of the responsibilities of state agencies and the nature of the job descriptions of their employees.

Nothing less is at stake than state autonomy and the right of states to organize their own governments, since once Congress can commandeer state agencies whose responsibilities are outside the field that Congress is empowered to regulate, Congress can shift with ease the cost of any federal measure to state government. Although this Court in *New York v. United States, supra,* 505 U.S. at 188, observed that "[t]he positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart," the Ninth Circuit in this case deemed *New York* irrelevant, and recently, in the cases arising out of the federal duties imposed by the Brady Act on local law enforcement officials, has again approved the conscription of state employees. *Mack v. United States,* 1995 U.S. App. Lexis 25263 (9th Cir. 1995). Thus, the question of Congress's power to conscript into federal service state employees, and the consequent impact on state sovereignty is ripe for clarification by this Court.

Accordingly, this Court should grant review of this case so that it can settle the following important questions central to federalism:

1. Whether the ruling in *New York v. United States, supra,* 505 U.S. at 188, that the "Federal Government may not compel the States to enact or administer a federal regulatory program" is limited to the exercise of Congress's power under the Commerce Clause, or whether, to the contrary, Congress's enactment of the Motor Voter Act under Article I, section 4 is subject to this Court's ruling in *New York.*

2. Regardless of whether *New York* applies to this Act, whether it nonetheless violates the Tenth Amendment for Congress to exercise its powers under Article I

to commandeer state employees to administer a federal program that is wholly outside the scope of their state responsibilities.

3. Conversely, whether Congress's power to regulate the time, place, and manner of federal elections under Article I, section 4 of the Constitution authorizes it to commandeer state agencies and employees not involved in the election process.

4. If Article I, section 4 does not authorize Congress to commandeer state agencies and state employees, whether the Motor Voter Act is authorized under the Fourteenth and Fifteenth Amendments.[4]

A. This Court Should Settle The Important Question Whether The Ruling In *New York v. United States* Is Limited To Congress's Exercise Of Power Under The Commerce Clause

In *New York v. United States, supra,* 505 U.S. 144, 188, this Court ruled that "[w]hatever the outer limits of [state] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."

However, the Motor Voter Act does exactly that. It compels each State to administer a federal regulatory program by requiring each State to "designate agencies for the registration of voters in elections for Federal office," 42 U.S.C. § 1973gg-5(a)(1), to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities

---

[4] This issue was fully briefed but never reached by the lower courts because they found that Article I, section 4 did authorize Congress to conscript state employees.

under this Act," 42 U.S.C. § 1973gg-8, and to work with the Secretary of Defense to develop and implement procedures so that persons may apply to register to vote at military recruitment offices, 42 U.S.C. § 1973gg-5. The Act then requires the state agencies to prepare voter registration forms pursuant to federal standards, to provide registration assistance pursuant to federal guidelines, and to process the completed forms.

In *New York*, this Court held that although Congress had the power to regulate low-level radioactive waste directly, the Low Level Radioactive Waste Policy Amendments Act violated the Tenth Amendment when it directed the States to regulate the disposal of radioactive waste according to federal standards. This Court observed that requiring the state governments to regulate pursuant to Congress's direction would "present a simple command to state governments to implement legislation enacted by Congress," 505 U.S. at 176, but that "even where Congress has authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts." 505 U.S. at 166. This Court ruled:

> "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."

New York v. United States, 505 U.S. at 178.

Accordingly, in this case, the "Motor Voter" Act constitutes an unconstitutional exercise of congressional power since it conscripts state governments as its agents when it directs each State to: "designate agencies for the registration of voters in elections for Federal office," 42 U.S.C. § 1973gg-5(a)(1); "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act," 42 U.S.C. § 1973gg-8; and develop procedures jointly with the Secretary of Defense, 42 U.S.C. § 1973gg-5.

Rather than follow *New York*, the district court and the Ninth Circuit chose to limit this Court's ruling in *New York v. United States*, *id.*, 505 U.S. 144, to Congress's exercise of its Commerce Clause powers. Without any citations, the Ninth Circuit ruled that "[t]he flaw in the State of California's argument is that it ignores Article I, section 4, which, unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue. [¶] Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators." *Voting Rights Coalition v. Wilson*, 60 F.3d at 1415.

Yet, nothing in *New York* suggests that the ruling should be limited to Congress's exercise of its Commerce Clause powers. Instead, without restricting itself to the Commerce Clause, this Court stated in *New York*, "[W]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 505 U.S. at 166. Likewise, this Court stated in *New York* that "[t]he Tenth Amendment

thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an *Article I* power." [Emphasis added] 505 U.S. at 157.

Nonetheless, the Ninth Circuit and other circuits have narrowly construed the ruling in *New York*.

For instance, the Seventh Circuit, in upholding the constitutionality of the "Motor Voter" Act in *Association of Community Organizations For Reform Now v. Edgar*, 56 F.3d 791 (1995), stated its belief that recent opinions of this Court mean that "the Tenth Amendment (not even cited by Illinois) [has been] put back in its bottle" and therefore that no "extratextual limitation" constrains Article I, section 4, which "places the burden of administering federal elections on the states." Yet, this confuses the distinction between regulating the manner of elections (which is permitted under Article I, section 4) and directing the States to compel certain state agencies to administer them.

Moreover, not long after issuing its decision in the instant case – which limited *New York* to laws enacted under the Commerce Clause – the Ninth Circuit again restricted the reach of *New York*. In *Mack v. U.S.*, 1995 U.S. App.Lexis 25263 (9th Cir. 1995), the Ninth Circuit upheld the constitutionality of a provision in the Brady Act, which requires local law enforcement officials to perform background checks on handgun purchasers – even though the Ninth Circuit acknowledged that it "requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program." Nonetheless, the Ninth Circuit in *Mack* concluded that "[a]lthough we concede that there is language in *New York* that lends support to the view of Mack . . . , that language must be interpreted in the context in which it

was offered. *New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act."

In conclusion, this Court should clarify whether the *New York* decision is limited to Congress's exercise of its Commerce Clause powers as ruled by the Ninth Circuit, or extends to Congress's exercise of powers under Article I, section 4.

B. This Court Should Settle The Important Question Of Whether The Tenth Amendment Prohibits Congress From Conscripting Into The Service Of The Federal Government State Employees And Agencies Whose Responsibilities Are Unrelated To The Article I Power Which Congress Is Exercising

This case also raises an important but long unsettled question of federalism: To what extent may Congress, in the exercise of its Article I powers, conscript state agencies and state employees to perform federal duties, particularly where those duties are wholly outside their normal field of work.

1. The Extent To Which Congress May Conscript State Employees Is Unsettled

States can only act through their elected officials and agents. A state's capability to function as a sovereign government requires that state employees act for the state, not the federal, government. Just as "[t]he power to tax is the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316 (1819), the power to impose time-consuming federal responsibilities on state agencies carries the power to destroy state autonomy. Moreover, the power to

determine the scope of the responsibilities of state officials and state agencies, as well as to fix the budget for administering those responsibilities, is peculiarly an attribute of state sovereignty, no less than the power of the State to determine where to place its seat of government. *See Coyne v. Smith*, 221 U.S. 559 (1911) (upholding Oklahoma's legislation relocating the state's capital, notwithstanding a restriction thereon in the congressional enabling act, under which the state was admitted to the Union). Accordingly, federal laws which conscript *state* employees, on state time, to assume responsibility for administering *federal* programs necessarily intrude on the state's sovereignty to carry out its own programs – unless, of course, the state has consented to perform the program as a condition for the receipt of federal funds. *See New York v. United States, supra*, 505 U.S. at 167; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

However, the extent to which the federal government may conscript state employees to carry out federal responsibilities is unsettled. In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), this Court observed that "the 19th Century view, expressed in a well-known slavery case, was that Congress 'has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' " *id.* at 761, *quoting Kentucky v. Dennison*, 24 How. 66, 107, 16 L.Ed. 717 (1861), but that "this rigid and isolated statement . . . is not representative of the law today. [footnote omitted]." This Court, however, declined in that case "to make a definitive choice between competing views of federal power to compel state regulatory activity." *Id.* at 764.

Since then, this Court has expressed disapproval of the federal government's conscripting of state agencies

and employees, but has not definitively resolved the issue. In *Bowen v. American Hospital Assn.*, 476 U.S. 610 (1986), this Court addressed whether Section 504 of the Rehabilitation Act authorized the issuance of a *federal* regulation that required designated *state* agencies to establish procedures to compel health care providers to report known or suspected instances of unlawful medical neglect of handicapped infants. This Court, in an opinion by Justice Stevens, observed that the regulations "effectively make medical neglect of handicapped newborns a state investigative priority, possibly forcing state agencies to shift scarce resources away from other enforcement activities. . . . " 476 U.S. at 639. The Court observed that while state agencies can be requested to document their own compliance with Section 504, "nothing in that provision authorizes him [the Secretary] to commandeer state agencies to enforce compliance by *other* recipients of federal funds (in this instance, hospitals)" and that "State child protective services agencies are not field offices of the HHS bureaucracy, and they may nof be conscripted against their will as the foot soldiers in a federal crusade." 476 U.S. at 642.

This proposition was repeated in *New York, supra*, 505 U.S. at 178, where this Court stated:

> "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,' The Federalist No. 39, p. 245 (C.

> Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment."

New York v. United States, 505 U.S. at 188.

Nonetheless, the Ninth Circuit – without citation to any authority whatsoever – ruled that "Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators." 60 F.3d at 1415. This Court needs to resolve this unsettled question over the extent of Congress's power to commandeer state employees to administer a federal program.

Indeed, the instant case raises the issue of conscription in particularly egregious circumstances because the Motor Voter Act seeks to conscript state employees whose responsibilities are wholly unrelated to the administration of election laws and thus outside the field which Congress is authorized to regulate under Article I, section 4. Congress is not seeking merely to regulate state election officials in their conduct of federal elections, but instead, to commandeer state employees at the State Department of Motor Vehicles and in public assistance agencies, whose state-mandated duties are wholly unrelated to the election responsibilities which Article I, Section 4 authorizes Congress to regulate.

Nor is this the only case in which the Ninth Circuit has approved the federal conscription of state employees. In *Mack v. United States*, 1995 U.S. App. Lexis 25263 (9th Cir. 1995), the Ninth Circuit recently upheld, against a Tenth Amendment challenge, the Brady Act's federal mandate that state law enforcement officials perform background checks of handgun purchasers. Once again, citing no authority, the Ninth Circuit reasoned that state employees could be conscripted by Congress because

"[t]he Brady Act is a regulatory program aimed at individuals and not the States":

> "It is true that, for a limited period of time, the Act requires *state* law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. . . . Their activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials." [Emphasis added.]

Whatever Congress's right may be to conscript state employees to administer the federal program required under the Brady Act, the conscription of state employees in the present case goes well beyond the circumstances in the Brady Act. As observed by the Ninth Circuit in *Mack*, the background investigation required by the Brady Act was "not alien" to the state law enforcement officials' "usual line of work." Here, in contrast, employees of the State Department of Motor Vehicles and state public assistance agencies are being commandeered to perform federal registration duties wholly outside their "usual line of work" and to administer Motor Voter's registration program on state time.

The Ninth Circuit's decisions in the *Mack* case and the instant proceeding demonstrate that this Court should grant certiorari to determine the extent to which the Congress, in the exercise of its Article I powers, can conscript state agencies and state employees and require them to assume federal duties wholly outside their normal field of work.

2. Federal Conscription of State Employees Raises Issues of Political Accountability Upon Which Our Federal System Rests

Conscription of state employees to assume federal responsibilities outside the scope of their normal duties also raises the issue of accountability, which goes to the heart of our federal system. In *New York v. United States*, 505 U.S. 144, this Court observed that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished" because "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 168-9. Likewise, in his concurring opinion, joined by Justice O'Connor, in *United States v. Lopez, supra*, 131 L.Ed.2d 626, Justice Kennedy stated that in order for the federal and state governments to control each other by competing for the affections of the people, "those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function."

In this case, state employees will be held responsible for the longer lines and greater delays at the Department of Motor Vehicles and public assistance offices, although the federal government's mandate that they assume federal voter registration responsibilities is the cause therefor. In essence, the federal government can insulate itself from the effects of its directives when it commandeers state agencies and employees to administer a federal program.

C. Alternatively, This Court Should Decide The Important Question Whether Article I, Section 4 Of The Constitution Authorizes Congress To Commandeer State Employees And Agencies Whose Responsibilities Are Unrelated To The Administration Of State Election Laws

Article I, section 4 of the U.S. Constitution provides as follows:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

Manifestly, nothing in the text of that section authorizes (or requires) Congress to commandeer state agencies and employees, whose duties are unrelated to the elections process, to administer federal elections. Nonetheless, the Ninth Circuit, in the opinion below, referred to the "array of authorities supporting a broad reach of Article I, section 4," 60 F.3d at 1414, and ruled: "The flaw in the State of California's argument is that it ignores Article I, section 4, which, unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue." *Voting Rights Coalition v. Wilson, id.*, 60 F.3d at 1415.

This case thus raises the question whether Article I, section 4 may properly be construed as authorizing Congress to commandeer state employees and agencies not involved in the election process to administer the "Motor Voter" Act.

In preserving our federalist system, this Court often construes statutes and constitutional powers to avoid upsetting the federal balance. Thus, the Court construed

the Age Discrimination in Employment Act so as not to intrude on the States' right to set a mandatory retirement age for state judges, *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and it construed the Commerce Clause power so as not to authorize the enactment of a Gun-Free School Zones Act, in partial recognition of the fact that "in areas such as criminal law enforcement or education . . . States historically have been sovereign." *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626, 641 (1995).

Likewise, this case presents an opportunity for the Court to construe Article I, section 4 in a way that does not authorize Congress to override the protections for state sovereignty embodied in the Tenth Amendment.

Despite the Ninth Circuit's decision to the contrary, no decision of this Court has ruled that Congress's authorization under Article I, section 4 means that Congress may conscript into the service of the Federal Government state agencies whose responsibilities are unrelated to the administration of the time, place, and manner of conducting elections.

Even the broadest decision on the reach of Article I, section 4, *Ex Parte Siebold*, 100 U.S. 371 (1879), merely ruled that Congress "may impose additional penalties for the prevention of frauds committed by the state officers . . . ," *id.* at 387, rejecting the argument that Congress had "no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States." *Id.* at 382.

That ruling is a far cry from commandeering state employees to administer a federal regulatory program, where those employees are not election officials and have no election duties to be regulated in accordance with Congress's Article I, section 4 power.

Indeed, the framers surely never envisioned that Article I, section 4 would be construed to authorize the federal government's conscription of state employees who work in state agencies not responsible for the administration of elections. *See* Federalist No. 59 (observing that the Article I, section 4 power was solely designed to allow Congress to regulate federal elections in "extraordinary circumstances" to prevent the States from refusing to conduct federal elections).

As this Court observed in connection with Article I, section 4 in *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), "[w]e see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers."

Moreover, the enactment of laws under Article I, section 4 requires special scrutiny because the self-interest of Congress in the regulation of federal elections may conflict with its interest in preserving the federal system established by the Constitution. This Court acknowledged in *Garcia v. San Antonio Metropolitian Transit Authority*, 469 U.S. 528, 554 (1985), that the courts can intervene "to compensate for possible failings in the national political process" when the States' participation in Congress will not protect the States from intrusions into state sovereignty. Such a possible failing exists when Congress exercises its power under Article I, section 4 to regulate federal elections, because its members have a conflict of interest between the enactment of measures which may assist in their election, and the maintenance of the delicate federal-state balance. In short, "the interests

of public officials . . . may not coincide with the Constitution's intergovernmental allocation of authority." *New York v. United States*, 505 U.S. at 183. Hence, where the Congress's Article I, section 4 power is involved, this Court must be particularly vigilant to avoid an exercise of that power which infringes on state sovereignty.

Accordingly, this Court should settle the important question whether Article I, section 4 – or any Article I power, for that matter – should be construed to authorize the commandeering of state agencies and employees whose duties fall outside the scope of the Article I power granted Congress.

D. This Case Also Raises The Question Whether Either The Fourteenth Or Fifteenth Amendment Grants Congress The Power To Enact The National Voter Registration Act

Because the district court and Ninth Circuit held that the Motor Voter Act was authorized under Article I, section 4 and did not violate the Tenth Amendment, neither court addressed respondents' other argument that the Fourteenth or Fifteenth Amendment authorized the Act.

However, were this Court to grant this petition and determine that Article I, section 4 cannot constitutionally authorize Congress to conscript state agencies and employees to administer the federal voter registration program required by the Motor Voter Act, the issue whether the Act is authorized by the Fourteenth or Fifteenth Amendment would be raised.

This issue, fully briefed in the courts below, presents an important question regarding the relationship between the Civil War Amendments and the Tenth Amendment.

Both the Fourteenth and Fifteenth Amendments grant Congress the power to enforce their provisions by "appropriate legislation." However, petitioners' position in the courts below was that the Motor Voter Act was not "appropriate" legislation because it was not directed toward removing discriminatory registration requirements, but merely toward making registration more convenient.

Few cases define what constitutes "appropriate legislation" under those amendments. However, a review of this Court's cases suggests that the type of legislation deemed "appropriate" under the enforcement clauses of those amendments is legislation which furthers the *prohibitions* of those amendments, such as enactments that prohibit certain practices which have a discriminatory effect, *e.g., City of Rome v. United States*, 446 U.S. 177 (1979) ("It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate' . . . "); *Ex Parte Virginia*, 100 U.S. 339 (1880) (Congress may bar practices which in themselves do not violate the Civil War Amendments so long as the prohibitions are appropriate, and are "adopted to carry out the objects.".)

Where Congress is not attacking an evil prohibited by the Fourteenth or Fifteenth Amendments, this Court has found that Congress cannot constitutionally exercise its powers under those amendments. For instance, in *United States v. Reese*, 92 U.S. 214, 218 (1875), cited with approval by this Court in *State of South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966), this Court ruled that Congress had not properly exercised its power under the

Fifteenth Amendment when it enacted legislation which prohibited all wrongful acts that obstructed a citizen from qualifying to vote because it was not limited to addressing racial discrimination but instead broadly prohibited any act that obstructed a citizen from qualifying to vote.

In this case, the Motor Voter Act does not seek to address discriminatory or unfair practices of the nature which the Fourteenth and Fifteenth Amendments were meant to address, but simply attempts to make it more *convenient* for people to register. And it seeks to do so by conscripting state agencies which had never administered election laws, and thus could not have engaged in any discrimination in the administration of elections.

This Court should therefore decide whether the Motor Voter Act constitutes "appropriate" legislation under the Fourteenth or Fifteenth Amendments. There is little case law on this subject, and a decision would clarify the restraints on federal power when exercised under the Civil War Amendments. Further, since the Act conscripts state employees, this case also raises the balance between the Civil War Amendments and the Tenth Amendment, *cf. Oregon v. Mitchell*, 400 U.S. 111, 128 (1970). This case would be the first to provide some critical guidance in this area.

CONCLUSION

This case presents an unusual opportunity for the Court to address a number of Tenth Amendment issues, including the extent of the Tenth Amendment's restraint on Congress's Article I powers other than the Commerce Clause, the reach of *New York v. United States*, the power of Congress to exercise its Article I power to conscript state agencies and state employees to administer a federal

program, the extent to which Article I, section 4 may be construed to authorize Congress to conscript state agencies and their employees whose responsibilities were heretofore unrelated to the administration of elections, and the relationship between the Civil War Amendments and the Tenth Amendment.

Petitioners respectfully request that this Court grant their petition for writ of certiorari so that the Court may take the next step in the preservation of our federalist system.

Dated: October 23, 1995

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
FLOYD D. SHIMOMURA
Senior Assistant Attorney General
CYRUS J. RICKARDS
Deputy Attorney General*
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 324-5494

Attorneys for Petitioners

*Counsel of Record

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VOTING RIGHTS COALITION; COALITION FOR AN AFRICAN-AMERICAN COMMUNITY AGENDA; LEAGUE OF WOMEN VOTERS OF CALIFORNIA; CALIFORNIA COMMON CAUSE; '94 COMMITTEE; STELLA DOMINQUEZ; CYNTHIA MORENO; and VERONICA MORENO, *Plaintiffs-Appellees,* v. PETE WILSON, Governor of the State of California; TONY MILLER, Acting Secretary of State, California; FRANK ZOLIN, Director of the California Department of Motor Vehicles; ELOISE ANDERSON, Director of the California Department of Social Services; BRENDA PREMO, Director of the California Department of Rehabilitation, *Defendants-Appellants.* v. JANET RENO, Attorney General; UNITED STATES OF AMERICA, *Third Party Plaintiffs-Appellees.*	No. 95-15449 D.C. No. CV-94-20860-JW OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
June 16, 1995 – San Francisco, California

Filed July 24, 1995

Before: Alfred T. Goodwin, Joseph T. Sneed,
and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Sneed

COUNSEL

Cyrus J. Rickards, Deputy Atty. General, Sacramento, California, for defendants-appellants.

Samuel R. Bagenstos, Steven H. Rosenbaum, United States Department of Justice, Washington, DC; Mei Lin Kwan-Gett, Mark D. Rosenbaum, ACLU Foundation of Southern California, Los Angeles, California, Robert Rubin, Lawyers' Committee for Civil Rights of San Francisco Bay Area, San Francisco, California, for the plaintiffs-appellees.

Miriam E. Brewster, Deputy Attorney, County of San Diego, San Diego, California; Anton Leof, Latham & Watkins, San Francisco, California; Michael J. Guzman, Latham & Watkins, Washington, DC; Daniel J. Popeo, Washington Legal Foundation, Washington, DC; Joseph Remcho, Remcho, Johansen & Purcell, San Francisco, California; Donald W. Brown, Brobeck, Phleger & Harrison, San Francisco, California; Douglas I. Horngrad, San Francisco, California, for amici.

OPINION

SNEED, Circuit Judge:

Governor Wilson, in his official capacity, directed the appropriate officials of the State of California not to comply with the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg-1 to -10 ("the Act"), on constitutional grounds. The Voting Rights Coalition, joined by the Attorney General of the United States, having come together as a result of a suit by the State of California against the United States to enjoin permanently the enforcement of the Act, obtained a permanent injunction in the district court enjoining California from failing to comply with the Act. The State of California sought to stay that injunction pending appeal by way of a motion to this court, which was denied. We affirm the judgment of the district court directing the State of California to comply with the Act.

The Act in form is not a simple directive to the states to provide voter registration at such places as the state receives applications for motor vehicle driver's licenses, and provides public assistance or services to persons with disabilities. Rather, it is a complex statute of ten sections bearing the marks of legislative draftsmanship similar to those borne by the Internal Revenue Code. For example, 42 U.S.C. § 1973gg-3, entitled "SIMULTANEOUS APPLICATION FOR VOTER REGISTRATION AND APPLICATION FOR MOTOR VEHICLE DRIVER'S LICENSE," contains five subsections, (a) through (e), of which the third, (c), sets forth its own two subsections, (1) and (2), and of which the section (2) sets forth its five subsections,

(A) through (E). That is not all. Within (A) through (E), there appear in (C) and (D) three subsections each. Thus, following the caption of section 3 of the Act, the State of California must conform to four levels of statutory structures.

This complexity suggests that the implementation of this Act could generate differences between the United States and California of interpretive and, possibly, constitutional importance. For this reason, our opinion is not intended to foreclose future judicial review of any such issues. Today we speak only with respect to an as yet unapplied statute. As a consequence, we assume, but do not decide, that all such interpretive or constitutional issues that might arise in the implementation of the Act do not impair our analysis of the Act's facial constitutionality.

Three provisions of the Constitution must be considered in our analysis of the constitutionality of the Act. The most important is Article I, section 4, which vests in Congress the power to alter state laws pertaining to the "Times, Places and Manner" of electing Representatives and Senators. The second is Article I, section 2, which gives the states the power to fix the qualifications of its voters. The third, on which California primarily relies, is the Tenth Amendment.

The relevant portion of Article I, section 4 reads as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by

> Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. I, Sec. 4, cl. 1. Initially, two aspects of the provision appear. No limits on this power are stated and registration procedures are not mentioned. As Chief Judge Posner of the Seventh Circuit pointed out in *Association of Community Orgs. for Reform Now (ACORN) v. Edgar*, No. 95-1800, 1995 WL 329726, at *1 (7th Cir. June 5, 1995) *summarized in* 63 U.S.L.W. 2776, 2777 (7th Cir. June 20, 1995) (No. 95-1800), registration did not exist as a procedure, separate from establishing one's qualifications to vote at the time and place of voting, when the Constitution was drafted. As a consequence, Article I, section 2 and the Seventeenth Amendment, in vesting the power to fix the qualifications of voters for Representatives and Senators in the states, do not explicitly remove the registration of voters by the states from the reach of the power of Congress, provided by Article I, section 4. The fact that some states include registration in their enumeration of qualifications does not alter this conclusion.[1]

Moreover, the Supreme Court has read the grant of power to Congress in Article I, section 4 as quite broad. In *Smiley v. Holm*, 285 U.S. 355, 366 (1932), the Court stated that Congress has

---

[1] With respect to this circuit, Alaska, Hawaii, Montana and Oregon treat registration as a qualification of voting. *See* Alaska Const. art. V, § 1; Alaska Stat. § 15.05.010 (1988); Haw. Const. art. II, § 1; Haw.Rev.Stat. § 11-11 (1985); Mont. Const. art. IV, § 2; Mont.Code Ann. § 13-1-111 (1994); Or. Const. art. II, § 2; Or.Rev.Stat. §§ 247.002, 247.009 (1993).

> authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

At an earlier date, *Ex Parte Siebold*, 100 U.S. 371, 382-97 (1879), upheld the power of Congress to impose duties, prohibitions, and sanctions for state election officials involved in conducting elections for federal office. Conflicting state laws were set aside.[2] 100 U.S. at 397.

---

[2] The Court continued to interpret broadly Congress's power under Article I, section 4. *See Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (authority to enforce the right to cast ballot and have ballot counted); *In re Coy*, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis Congressional elections); *see also United States v. Simms*, 508 F.Supp. 1179, 1183-85 (W.D.La.1979) (criminalizing payments in reference to registration or voting does not offend Tenth Amendment); *Prigmore v. Renfro*, 356 F.Supp. 427, 430 (N.D.Ala.1972) (absentee ballot program upheld as applied to federal elections), *aff'd*, 410 U.S. 919 (1973); *Fowler v. Adams*, 315 F.Supp. 592, 594 (M.D.Fla.1970), *appeal dismissed*, 400 U.S. 986 (1971) (authority to exact 5 percent filing fee for Congressional elections).

The broad power given to Congress over congressional elections has been extended to presidential elections, *Burroughs v. United States*, 290 U.S. 534, 545 (1934), and to party primaries involving contestants for congressional positions, *United States v. Classic*, 313 U.S. 299, 317 (1941). Judge Wisdom of the Fifth Circuit, while sitting on a three-judge district court in *United States v. Manning*, 215 F.Supp. 272, 284 (W.D.La.1963), expansively observed that " 'the manner of holding elections' therefore must be read as referring to the entire electoral process, from the first step of registering to the last step, the [s]tate's promulgation of honest returns." It is not necessary to rely on a reading of Article I, section 4 of such breadth to find that the Act before us, on its face, fits comfortably within its grasp. However, we are reminded that Justice Black in *Oregon v. Mitchell*, 400 U.S. 112, 123-25 (1970), in his plurality opinion, recognized that, while Congress could lower the voting age in federal elections from twenty-one to eighteen, Article I, section 2 bars Congress from doing so in elections for state officials.

This array of authorities supporting a broad reach of Article I, section 4 does not permit this court to limit its meaning to that given it by Hamilton in Federalist No. 59.[3] He saw it as a means by which Congress could

---

[3] The Federalist No. 59, at 399 (Alexander Hamilton) (Jacob E. Cooke ed., 1961):

> Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to

preserve itself from states seeking its destruction by refusing to conduct elections. Story enhanced its utility somewhat in his Commentaries.[4]

The Tenth Amendment position argued by the State of California rests on *New York v. United States*, 112 S.Ct. 2408, 2425-29 (1992), which held, in its relevant part, that Congress could not impose on the states the burden of exercising its power under the Constitution to regulate interstate commerce. Of course, Congress could obtain the consent of a state, or states, to undertake such a burden upon payment of a mutually acceptable consideration. The flaw in the State of California's argument is that it ignores Article I, section 4, which, unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue.

Congress may conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its

---

> administer its affairs. It is to little purpose to say that a neglect or omission of this kind, would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk.

[4] Joseph Story, Commentaries on the Constitution of the United States 292-93 (Rotunda and Nowak ed. 1987). Story gave several justifications for Article 1, section 4: as a means to correct negligent state law, to impose a check on senatorial plots to prevent state citizens from holding elections, to ensure safe elections in times of invasion, and to prevent vacancies by maintaining uniformity in the times and manner of elections.

terms intended to be borne by the states without compensation. None of the authorities recognizing the exercise of the Times, Places and Manner power vested in Congress have suggested, even remotely, the necessity of the United States bearing the burden of any alteration it imposed. True, usually the actual cost to the states was relatively small, while in this instance, it may be significant. That does not change the principle which is embodied in Article I, section 4, but it does dictate that the implementation of the Act be done sensitively. To separate the power to command change from the burden of meeting its costs is always troublesome whatever its context. Nor is legitimate concern diminished by the fact that enactment of the Act was driven substantially by partisan politics.

It is not the role of this court to undertake at this time the difficult task of implementing the Act. Even a cursory glance at the Act suggests this will not be a simple undertaking. Even though the Act by its terms does not control the practices of voter registration for elections of state and local officials, its impact on such elections probably will be significant.

It is at this juncture that the sovereignty of the State of California under the Tenth Amendment becomes a constitutional concern. In *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842, 1872 (1995), Justice Kennedy, in his concurring opinion, explaining his decisive fifth vote in the decision to invalidate the effort of certain states to limit the terms their Representatives and Senators could serve in Congress, eloquently described the fundamental structure of the Constitution:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

The State of California is a sovereign body within the Constitution. There can be no doubt of that, no less than of the power of Congress under Article I, section 4 of the Constitution. Absent the invocation by Congress of its authority under the Fourteenth Amendment, the State of California possesses the power to fix the time, place, and manner of the election of its officials. It follows, therefore, that an accommodation, as Justice Kennedy made clear, of sovereign rights is necessary.

Presently, we explicitly recognize that, inasmuch as Congress only sought to regulate the times, places, and manner of electing Representatives and Senators, it did not intend to perform the same function for state and local officials. No doubt it was recognized by Congress that the Act would have an impact on registration procedures applicable to state and local elections and even perhaps hoped that it would do so. Nonetheless, it did not attempt to do so explicitly.

The State of California, in supplemental briefing, has confirmed that the Act will have a significant impact on its registration procedures applicable to elections of state and local officials. However, at this point we cannot determine the extent to which, if at all, these changes impinge on the legitimate retained sovereignty of the states under the "two orders of government" (as Justice Kennedy put it) of the Constitution. Clearly, the Constitution denies to the states any power to obstruct the exercise by Congress of its power to "make or alter" the "Times, Places and Manner" of electing "Senators and Representatives," nor does it impose on the United States the burden, always heretofore borne by the states, of defraying the costs incurred by such alterations.

At this juncture of these proceedings, we can only direct the district court on remand to impose no burdens on the state not authorized by the Act which would impair the State of California's retained power to conduct its state elections as it sees fit. We foresee the possibility in which the district court will be asked to determine whether a certain implementation of the statute sought by the United States, which is helpful but not essential to its interests, is properly resisted by the state on substantial grounds related to its sovereignty. Should such occasions arise, we would expect the district court to respond with an informed understanding of the duality of sovereignty imbedded within the Constitution of the United States.

This adjuration springs from the same perception that led the unanimous Court of Appeals for the Seventh Circuit to strike from the district court's decree its fourth paragraph which Chief Judge Posner, in his opinion for

the court, described as failing "to exhibit an adequate sensitivity to the principle of federalism." *ACORN*, 1995 WL 329726, at *7.

We, too, by this opinion, direct the district court to approach its task of implementation with an "adequate sensitivity to the principle of federalism." This panel hereby retains jurisdiction in the event of subsequent proceedings and appeals.

No party to recover costs on appeal.

AFFIRMED AND REMANDED FOR IMPLEMENTATION.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETE WILSON, Governor of the State of California; STATE OF CALIFORNIA, Plaintiffs, vs. UNITED STATES OF AMERICA; JANET RENO, Attorney General; TREVOR POTTER, Chairman, Federal Elections Commission; FEDERAL ELECTIONS COMMISSION, Defendants.	Case No. C 95-20042 JW Case No. C 94-20860 JW (Related Action) INJUNCTION ORDERING THE STATE OF CALIFORNIA AND GOVERNOR PETE WILSON TO COMPLY WITH THE NATIONAL VOTER REGISTRATION ACT OF 1993

I. INTRODUCTION

This action questions whether the National Voter Registration Act, an otherwise laudable attempt by Congress to promote nondiscriminatory voter registration standards, is nevertheless unconstitutional because it invades powers reserved to the states.

The United States and a group of private citizens, which shall be referred to as "the Voting Rights Coalition," seek to compel the State of California and Governor Pete Wilson to comply with the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg, *et seq.* ("NVRA"). The State of California and Governor Wilson seek to enjoin enforcement of the NVRA on the ground

that it is unconstitutional under the Tenth Amendment of the United States Constitution. For the reasons set forth below, the Court finds that the NVRA is constitutional and permanently enjoins the State of California and Governor Wilson from refusing to comply with its provisions.

II. FINDINGS OF FACT

There are no disputed issues of material fact. The NVRA provides that states requiring advance registration to vote in federal elections must permit voter registration by: (1) mail-in application; (2) simultaneous application with driver's license application, renewal, or change of address; and (3) simultaneous application at disability and public assistance agencies as well as other agencies designated by the state. *See* NVRA §§ 4-7, 42 U.S.C. §§ 1973gg-2 to 1973gg-5. The NVRA also establishes procedures and standards governing maintenance of voter registration rolls. NVRA § 8, 42 U.S.C. § 1973-6. States were required to comply with the NVRA by January 1, 1995. NVRA § 13, 42 U.S.C. § 1973gg note.

On August 12, 1994, Governor Wilson issued Executive Order No. V-98-94, which orders California state agencies to comply with the NVRA *only* "to the extent [that] federal funding is made available for such purposes." *Id.*

Believing the Governor's order was tantamount to a direct order that state agencies not implement the NVRA, on December 14, 1994, the Voting Rights Coalition and other interested private parties filed an action in this Court (*Voting Rights Coalition, et al. v. Pete Wilson, et al.,*

C 94-20860 JW) seeking to enforce the NVRA. Section 11 of the NVRA permits private enforcement suits. Subsequently, the State of California and Governor Wilson filed a lawsuit against the United States, the Attorney General of the United States, the Federal Elections Commission ("FEC") and the Chairman of the FEC, contending that the NVRA is unconstitutional and requesting that the Court permanently enjoin its enforcement.

On January 23, 1995, the United States filed an answer, counter-claim and third party complaint. The counter-claim alleges that the State of California is violating the NVRA and seeks to compel its enforcement.

On January 27, 1995, each of the parties filed a motion for a preliminary injunction. The United States and the private parties seek immediate enforcement of the NVRA. The State of California and Governor Wilson seek immediate restraint against enforcement. The Court determined that the constitutionality of the NVRA is a dispositive legal issue in both lawsuits and that its constitutionality could be decided on the merits at the hearing of the motions for preliminary injunction. Accordingly, on February 8, 1995, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, the Court ordered the hearing on the merits of the constitutionality of the NVRA consolidated with the hearing on the motions for preliminary injunction.

On March 2, 1995 the case was argued and submitted for decision.

III. CONCLUSIONS OF LAW

A. Constitutionality of the NVRA

The Court begins the task of deciding the constitutionality of the NVRA by examining the language of the Constitution. Article I, Section 4 specifically states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. U.S. Const. art. I, § 4, cl. 1.

Article I, Section 4 has been interpreted to afford broad power to Congress. *Smiley v. Holm*, 285 U.S. 355 (1931); *United States v. Manning*, 215 F. Supp. 272 (W.D. La. 1963). Courts have approved congressional action taken pursuant to Article I, Section 4 which have required states to significantly modify their federal voting procedures. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), over objections by the State of Oregon, the Supreme Court upheld the constitutionality of 1970 amendments to the Voting Rights Act. The Court confirmed Congress' broad authority to make or alter laws regulating national elections, including its power over voter registration:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and

> canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. *Id.* at 122 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1931)).

The State of California and Governor Wilson contend that, while Congress is afforded power to regulate elections, the Tenth Amendment prohibits Congress from requiring a particular state agency, not otherwise designated by the state for registration, to administer a federal voter registration scheme. The Tenth Amendment reserves to the states those powers not delegated to the federal government. The State of California asserts that the NVRA violates the Tenth Amendment of the United States Constitution because it commandeers state agencies to administer a federal election program. The State of California relies on *New York v. United States*, 505 U.S. ___, 112 S.Ct. 2408 (1992) and related cases to support its position that Congress exceeded the scope of its enumerated constitutional powers by requiring a state to expend resources to carry out a congressional mandate.

In *New York*, the Supreme Court upheld portions of the Low Level Radioactive Waste Policy Act ("the Act") as a permissible exercise of congressional power to regulate disposal of radioactive waste under the Commerce Clause. Pertinent to the State of California's argument in this case, the Court struck down provisions of the Act requiring those states which failed to regulate according to the instructions of Congress to "take title" and accept ownership of and financial responsibility for the waste.

The Court observed that these "take title" requirements went beyond the authority of Congress to regulate interstate commerce. While Congress could *influence* state conduct by attaching conditions on the receipt of federal funds, it could not commandeer the legislative process of the state by directly compelling it to enact a federal regulatory program. "Whether one views the take title provision as lying outside Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 2429.

Although the principles outlining the constitutional boundaries between congressional power and state sovereignty discussed in *New York* are applicable to this case, *New York* is not controlling here because it involves a different constitutional provision. The *New York* decision discussed the limits of congressional power under the Commerce Clause. The *New York* Court held that Congress had the "authority to regulate private activity under the Commerce Clause", but that it did not have the power to require *states* to regulate its program. *Id.* at 2424.

In contrast, Article I, Section 4 specifically states that Congress may make or alter state regulations concerning the time, place and manner of federal elections. Consequently, Congress through the NVRA may directly regulate the state's manner and means of voter registration without invading an area reserved to the states. As the court noted in *United States v. Manning*, 215 F. Supp. 272 (1963):

> [N]othing in the language or history of the Tenth Amendment gives the State the exclusive sovereignty over the election processes against the federal government's otherwise constitutional exercise of a power within the scope of Article I, Section 4 of the Constitution and the Fourteenth and Fifteenth Amendments. In Justice Holmes's phrase, this "is not a controversy between equals." It is necessary at this time to say again, and underscore it, that *within the area of delegated power, express or implied, the Tenth Amendment does not reduce the powers of the United States.* Instead, notwithstanding its origin, the Tenth Amendment reaffirms the reality of the nation as a nation. It reaffirms the sovereignty of the federal union when a conflict between a state and the United States puts the national interest at stake. *Id.* at 277.

In the Ninth Circuit, in order to obtain a preliminary injunction, the moving party must show a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor. *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1575 (Fed. Cir. 1990); *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 (9th Cir. 1989). As set forth above, the Court finds that, with respect to the Constitutionality of the NVRA, the United States and the Voting Rights Coalition satisfy these requirements. Therefore, since the trial on the merits has been advanced under Rule 65(a)(2), it is appropriate to issue a permanent injunction.

B. Class Certification

The Voting Rights Coalition and other interested private parties move the Court to certify a class, pursuant to Rule 23 of the Federal Rules of Civil Procedure. The following class definition was proposed:

> All United States citizens over the age of eighteen and resident in the State of California who are not registered to vote, who have moved since their last voter registration, who may desire to re-register to vote during the pendency of this action, who may be subject to removal of their voter registration or who may be denied the right to vote in violation of the NVRA.

Rule 23(a) provides that a class action may be brought only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. The Court finds that these prerequisites have been met in this instance.

The Court further finds that it has been established that the State of California has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief appropriate, in compliance with Rule 23(b)(2). Therefore, the Court GRANTS the motion for class certification. Accordingly, Plaintiffs Stella Dominquez, Cynthia Moreno and Veronica Moreno are hereby certified to represent a Plaintiff Class as defined above, in these consolidated actions. Notice is not required for absent class members.

IV. JUDGMENT

Based upon the foregoing, the Court DENIES the State of California's motion for entry of an injunction and GRANTS the Voting Rights Coalition's motion for entry of an injunction. The Court finds that the NVRA is constitutional and is binding on the State of California. The State of California and Governor Wilson are permanently enjoined from failing to comply with the provisions of the NVRA.

Within ten (10) days of this Order, the State of California and Governor Wilson shall file and serve a proposed plan for implementing the NVRA. The plan shall specify the dates by which the State of California shall be in full compliance with the provisions of the NVRA. The Court reserves the right to require status reports as to the manner and timing of implementation.

The Court bifurcates and reserves for separate determination the claims of the Voting Rights Coalition regarding past and future conduct by the State of California and Governor Wilson with respect to implementing the NVRA.

The Court DENIES the State of California and Governor Wilson's evidentiary objections to the declarations which have been submitted by the Voting Rights Coalition and other interested private parties and the United States. The Court finds that the declarations are not relevant to the determination of the constitutionality of the NVRA.

The Court also DENIES the State of California and Governor Wilson's request for a stay of this Order, pursuant to Rules 27 and 62(c) of the Federal Rules of Civil Procedure.

Based upon the oral motion of the United States, the Court DISMISSES without prejudice the FEC and FEC Chairman Trevor Potter.

IT IS SO ORDERED.

DATED: March 2, 1995

/s/ James Ware
JAMES WARE
United States District Judge

This is to certify that copies of this order have been mailed to:

Robert Rubin
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA
301 Mission Street, Suite 400
San Francisco, CA 94105

Mark D. Rosenbaum
ACLU FOUNDATION OF SOUTHERN
CALIFORNIA
1616 Beverly Drive
Los Angeles, CA 90026

Alan L. Schlosser
ACLU FOUNDATION OF NORTHERN
CALIFORNIA
1663 Mission Street, Suite 460
San Francisco, CA 94103

Kathryn K. Imahara
ASIAN PACIFIC AMERICAN LEGAL
CENTER OF SOUTHERN CALIFORNIA
1010 South Flower Street, Suite 302
Los Angeles, CA 90015

William R. Tamayo
ASIAN LAW CAUCUS, INC.
468 Bush Street, Third Floor
San Francisco, CA 94108

Joaquin G. Avila
Voting Rights Attorney
Parktown Office Building
1774 Clear Lake Avenue
Milpitas, CA 95035

Harry Bremond
WILSON, SONSINI, GOODRICH & ROSATI
650 Page Mill Road
Palo Alto, CA 94304-1050

David H. Raizman
WESTERN LAW CENTER FOR
DISABILITY RIGHTS
1441 W. Olympic Blvd.
Los Angeles, CA 90015

Elaine B. Feingold
DISABILITY RIGHTS AND EDUCATION
DEFENSE FUND, INC.
2212 Sixth Street
Berkeley, CA 94710

Cyrus J. Rickards
OFFICE OF THE ATTORNEY GENERAL
1515 K Street
P.O. Box 944255
Sacramento, CA 94244-2550

Pete Wilson
GOVERNOR OF THE STATE OF CALIFORNIA
1st Floor, State Capitol
Sacramento, CA 95814

Bill Jones
SECRETARY OF STATE
1230 J Street, Suite 209
Sacramento, CA 95814

Brenda Premo
DEPARTMENT OF REHABILITATION
830 K Street, Room 307
Sacramento, CA 94244

Frank Zolin
DEPARTMENT OF MOTOR VEHICLES
2415 1st Avenue
Sacramento, CA 95818

Eloise Anderson
DEPARTMENT OF SOCIAL SERVICES
744 P Street
Sacramento, CA 95814

Holly Lee Wiseman
U.S. DEPARTMENT OF JUSTICE
Civil Rights Division, Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

Lawrence E. Noble
FEDERAL ELECTIONS COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

Michael J. Yamaguchi
UNITED STATES ATTORNEY
450 Golden Gate Avenue
San Francisco, CA 94102

Dated: 3/2/95

CLERK OF COURT

By: Ronald L. Davis
Ronald L. Davis
Deputy Clerk

NATIONAL VOTER REGISTRATION ACT OF 1993
(PUBLIC LAW 103-31 – MAY 20, 1993)
Revised 2/10/95

An Act

To establish national voter registration procedures for Federal elections, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the "National Voter Registration Act of 1993".

Sec. 2. FINDINGS AND PURPOSES.

(a) FINDINGS. – The Congress finds that –

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) PURPOSES. – The purposes of this Act are –

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

SEC. 3. DEFINITIONS

As used in this Act –

(1) the term "election" has the meaning stated in section 301(1) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(1));

(2) the term "Federal office" has the meaning stated in section 301(3) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(3));

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(4) the term "State" means a State of the United States and the District of Columbia; and

(5) the term "voter registration agency" means an office designated under section 7(a)(1) to perform voter registration activities.

SEC. 4. NATIONAL PROCEDURES FOR VOTER REGISTRATION FOR ELECTIONS FOR FEDERAL OFFICE.

(a) IN GENERAL. – Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration

provide for under State law, each State shall establish procedures to register to vote in elections for Federal office –

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 5;

(2) by mail application pursuant to section 6; and

(3) by application in person –

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 7.

(b) NONAPPLICABILITY TO CERTAIN STATES. – This Act does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after March 11, 1993, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after March 11, 1993, or that was enacted on or prior to March 11, 1993, and by its terms is to come into effect upon the enactment of this Act, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

SEC. 5. SIMULTANEOUS APPLICATION FOR VOTER REGISTRATION AND APPLICATION FOR MOTOR VEHICLE DRIVER'S LICENSE.

(a) IN GENERAL. –

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) LIMITATION ON USE OF INFORMATION. – No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) FORMS AND PROCEDURES. –

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license –

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) may require only the minimum amount of information necessary to –

(i) prevent duplicate voter registrations; and

(ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(C) shall include a statement that –

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) shall include, in print that is identical to that used in the attestation portion of the application –

(i) the information required in section 8(a)(5) (A) and (B);

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which

the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes, and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) CHANGE OF ADDRESS. – Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) TRANSMITTAL DEADLINE. –

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election office not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

SEC. 6. MAIL REGISTRATION.

(a) FORM. –

(1) Each State shall accept and use the mail voter registration application form prescribed by the

Federal Election Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 9(b) for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) AVAILABILITY OF FORMS. – The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) FIRST TIME VOTERS. –

(1) Subject to paragraph (2), a State may by law require a person to vote in person if –

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person –

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1 et seq.);

(B) who is provided the right to vote otherwise than in person under section

3(b)(2)(B)(ii) of the Voting Accessibility for the Elderly and Handicapped Act (42 U.S.C. 1973ee-1(b)(2)(B)(ii)); or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) UNDELIVERED NOTICES. – If a notice of the disposition of a mail voter registration application under section 8(a)(2) is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 8(d).

SEC. 7. VOTER REGISTRATION AGENCIES.

(a) DESIGNATION. –

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies –

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3) (A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include –

(i) State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license

bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities; and

(ii) Federal and nongovernmental offices, with the agreement of such offices.

(4) (A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not –

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall –

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance –

(i) the mail voter registration application form described in section 9(a)(2), including a statement that –

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section

9(a)(2), unless the applicant, in writing, declines to register to vote;

(B) provide a form that includes –

(i) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application in private."; and

(v) the statement, "If you believe that someone has interfered with your

right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with _____.", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) FEDERAL GOVERNMENT AND PRIVATE SECTOR COOPERATION. – All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a), and all nongovernmental entities are encouraged to do so.

(c) ARMED FORCES RECRUITMENT OFFICES. –

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for

persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) for all purposes of this Act.

(d) TRANSMITTAL DEADLINE. –

(1) subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an elections, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

SEC. 8. REQUIREMENTS WITH RESPECT TO ADMINISTRATION OF VOTER REGISTRATION

(a) IN GENERAL. – In the administration of voter registration for elections for Federal office, each State shall –

(1) ensure that any eligible applicant is registered to vote in an election –

(A) in the case of registration with a motor vehicle application under section 5, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided

by State law, before the date of the election;

(B) in the case of registration by mail under section 6, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by the State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require that appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except –

(A) at the request of the registrant,

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of –

(A) the death of a registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 5, 6, and 7 of –

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) CONFIRMATION OF VOTER REGISTRATION. – Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office –

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote.

(c) VOTER REMOVAL PROGRAMS. –

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which –

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that –

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2) (A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the name of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude –

(i) the removal of names from official lists of voters on a basis described in

paragraph (3) (A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this Act.

(d) REMOVAL OF NAMES FROM VOTING ROLLS. –

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant –

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B) (i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the

registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) PROCEDURE FOR VOTING FOLLOWING FAILURE TO RETURN CARD. –

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2) (A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant –

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii) (I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election,

upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) CHANGE OF VOTING ADDRESS WITHIN A JURISDICTION. – In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) CONVICTION IN FEDERAL COURT. –

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the

conviction to the chief State election official designated under section 10 of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include –

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On the request of the chief State election official of the State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) REDUCED POSTAL RATES. –

(1) Subchapter II of chapter 36 of title 39, United States Code, is amended by adding at the end the following:

"§ 3629. Reduced rates for voter registration purposes

"The Postal Service shall make available to a State or local voting registration official the rate for any class of mail that is available to a qualified nonprofit organization under section 3626 for the purpose of making a mailing that the official certifies is required or authorized by the National Voter Registration Act of 1993.".

(2) The first sentence of section 2401(c) of title 39, United States Code, is amended by striking out "and 3626(a)-(h) and (j)-(k) of this title," and inserting in lieu thereof "3636(a)-(h), 3626(j)-(k), and 3629 of this title".

(3) Section 3627 of title 39, United States Code, is amended by striking out "or 3626 of this title," and inserting in lieu thereof "3626, or 3629 of this title".

(4) The table of sections for chapter 36 of title 39, United States Code, is amended by inserting after the item relating to section 3628 the following item:

"3629. Reduced rates for voter registration purposes.".

(i) PUBLIC DISCLOSURE OF VOTER REGISTRATION ACTIVITIES. –

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable

cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) DEFINITION. – For the purposes of this section, the term "registrar's jurisdiction" means –

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more that one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

SEC. 9. FEDERAL COORDINATION AND REGULATIONS.

(a) IN GENERAL. – The Federal Election Commission –

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this Act on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this Act; and

(4) shall provide information to the States with respect to the responsibilities of the State under this Act.

(b) CONTENTS OF MAIL VOTER REGISTRATION FORM. – The mail voter registration form developed under subsection (a)(2) –

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that –

(A) specifies each eligibility requirement (including citizenship);

(B) contains attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

(i) the information required in section 8(a)(5)(A) and (B);

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

SEC. 10. DESIGNATION OF CHIEF STATE ELECTION OFFICIAL.

Each State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this Act.

SEC. 11. CIVIL ENFORCEMENT AND PRIVATE RIGHT OF ACTION.

(a) ATTORNEY GENERAL. – The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this Act.

(b) PRIVATE RIGHT OF ACTION. –

(1) A person who is aggrieved by a violation of this Act may provide written notice of the violation to the chief election official of the State involved.

(2) If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

(3) If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved person need not provide notice to the chief election official of the State under paragraph (1) before bringing a civil action under paragraph (2).

(c) ATTORNEY'S FEES. – In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

(d) RELATION TO OTHER LAWS. –

(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the

rights and remedies established by this section nor any other provision of this Act shall supersede, restrict, or limit the application of the Voting Right Act of 1965 (42 U.S.C. 1973 et seq.).

(2) Nothing in this Act authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

SEC. 12. CRIMINAL PENALTIES.

A person, including an election official, who in any election for Federal office –

(1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for –

(A) registering to vote, or voting, or attempting to register to vote;

(B) urging or aiding any person to register to vote, to vote, or to attempt to register to vote; or

(C) exercising any right under this Act; or

(2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by –

(A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

(B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent

under the laws of the State in which the election is held,

shall be fined in accordance with title 18, United States Code (which fines shall be paid into the general fund of the Treasury, miscellaneous receipts (pursuant to section 3302 of title 31, United States Code), notwithstanding any other law), or imprisoned not more than 5 years or both.

SEC. 13. EFFECTIVE DATE.

This Act shall take effect –

(1) with respect to a State that on the date of enactment of this Act has a provision in the constitution of the State that would preclude compliance with this Act unless the State maintained separate Federal and State official lists of eligible voters, on the later of –

(A) January 1, 1996; or

(B) the date that is 120 days after the date by which, under the constitution of the State as in effect on the date of enactment of this Act, it would be legally possible to adopt and place into effect any amendments to the constitution of the State that are necessary to permit such compliance with this Act without requiring a special election; and

(2) with respect to any State not described in paragraph (1), on January 1, 1995.

Approved May 20, 1993.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Apportionment of Representatives

SECTION 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Disqualification for Public Office

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Public Debt, Guarantee of

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Power of Congress

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Proposed June 13, 1866; ratified July 9, 1868; certified July 28, 1868.

AMENDMENT XV

Elective Franchise

Right of Citizens to Vote

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Power of Congress

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Proposed February 26, 1869; ratified February 3, 1870; certified March 30, 1870.

Supreme Court, U.S.
FILED
DEC 12 1995
CLERK

No. 95-673

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PETE WILSON,
GOVERNOR OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

VOTING RIGHTS COALITION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND UNITED STATES REPRESENTATIVES CARLOS MOORHEAD, DAVID DREIER, ELTON GALLEGLY, KEN CALVERT, HOWARD P. McKEON, RANDY CUNNINGHAM, ROBERT DORNAN, STEPHEN HORN, JAY KIM, RON PACKARD, DANA ROHRABACHER, JERRY LEWIS, CHRIS COX, ED ROYCE, WALLY HERGER, DUNCAN HUNTER, JOHN DOOLITTLE, BRIAN BILBRAY, FRANK RIGGS, BILL BAKER, SONNY BONO, AND ANDREA SEASTRAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Daniel J. Popeo
David A. Price
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: December 12, 1995

CASILLAS PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 202-223-1220

22pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Constitutionality of the National Voter Registration Act Is An Issue of Nationwide Significance and Nationwide Litigation 4

II. The National Voter Registration Act Commandeers State Agencies in Contravention of the Tenth Amendment 6

III. Article I, Section 4 Does Not Give Congress the Power to Conscript State Resources 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases:

ACORN v. Edgar,
56 F.3d 791 (7th Cir. 1995) 5-6, 11

FERC v. Mississippi,
456 U.S. 742 (1982) 10

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 7, 15

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,
452 U.S. 264 (1981) 10

Maryland v. Wirtz,
392 U.S. 183 (1968) 7

National League of Cities v. Usery,
426 U.S. 833 (1976) 7

New York v. United States,
112 S. Ct. 2408 (1992) . . . . . *passim*

Oregon v. Mitchell,
400 U.S. 112 (1970) 10, 13

South Dakota v. Dole,
483 U.S. 203 (1987) 10

Constitutional and Statutory Provisions:

U.S. Const., amend. X . . . . . *passim*

42 U.S.C. § 1973gg-3 4

42 U.S.C. § 1973gg-4 4

42 U.S.C. § 1973gg-5 4

42 U.S.C. § 1973gg-8 4

42 U.S.C. § 1973gg-9 6

42 U.S.C. § 2021b *et seq.* 7

Other Authorities:

The Federalist 12-13

2 Philip Kurland & Ralph Lerner, *The Founders' Constitution* (1987) 12

2 Joseph Story, *Commentaries on the Constitution of the United States* (1st ed. 1833) 11, 13

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 14-15

U.S. Federal Election Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office* (1993-1994) 5-9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-673

PETE WILSON,
GOVERNOR OF THE STATE
OF CALIFORNIA, *et al.*,

Petitioners,

v.

VOTING RIGHTS COALITION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 100,000 supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public

interest, and has a particular interest in ensuring that the rights of states are fully respected by the federal government. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before the this Court, as well as other courts across the country.

WLF has argued in a number of courts against the constitutionality of the statute at issue here, the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1, *et seq.*, popularly known as the "motor voter" statute. WLF filed *amicus* briefs in the district court and appeals court below supporting California's position. WLF also filed an *amicus* brief in support of Michigan in its similar litigation, *ACORN v. Miller* (W.D. Mich. No. 4:95-cv-45). In addition, WLF's Legal Studies Division has published a paper analysing constitutional issues raised by the statute. *See* Maureen E. Mahoney & Michael J. Guzman, *With Motor-Voter Bill, Congress May Have Invited A Constitutional Challenge* (1994).

United States Representatives Carlos Moorhead, David Dreier, Elton Gallegly, Ken Calvert, Howard P. McKeon, Randy Cunningham, Robert Dornan, Stephen Horn, Jay Kim, Ron Packard, Dana Rohrabacher, Jerry Lewis, Chris Cox, Ed Royce, Wally Herger, Duncan Hunter, John Doolittle, Brian Bilbray, Frank Riggs, Bill Baker, Sonny Bono, and Andrea Seastrand are Members of the California delegation to Congress. Because the Act would unconstitutionally impose additional costs on their constituents and would increase the burdens on state and local government services, these legislators oppose the position of the United States and the private plaintiffs in this case.

All parties have consented to WLF's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

1. The National Voter Registration Act of 1993 intrudes deeply into the governmental operations of the states and imposes costly affirmative obligations on the states. Consequently, its constitutionality has been challenged by seven states across the country, including California. These cases have arisen either as actions brought by a state against the United States, as actions brought by the United States or private groups against a state, or both (as here). Four of these cases, counting this one, are still pending. In view of the efforts by numerous states to have the Act declared violative of their sovereignty, this Court should address the issues presented.

2. With the Act, Congress has conscripted state resources in the same manner as the federal statute that this Court struck down in *New York v. United States*, 112 S. Ct. 2408 (1992): it compels the states' participation, compels state legislatures to enact legislation, compels state personnel to carry out the federal scheme, and compels state expenditures.

3. The power of Congress, under Article I, Section 4, to "make or alter" State laws and regulations that determine the "Times, Places and Manner of holding Elections for Senators and Representatives" does not validate the Act. The text and historical background of the provision, as well as this Court's decision in *New York*, indicate that Article I, Section 4 does not authorize the Act's conscription of state resources.

ARGUMENT

I. The Constitutionality of the National Voter Registration Act Is An Issue of Nationwide Significance and Nationwide Litigation

Even if the issue presented here affected only California's voter registration program, and were irrelevant to that of any other state, the consequences of the decision below would be considerable. The National Voter Registration Act not only upends current California law on voter registration, but requires the state to provide costly services in connection with registration.

Specifically, the Act provides, *inter alia*, that (1) each State must appoint a "chief State election official" who shall be ultimately responsible for implementation of the Act and coordination with other affected state agencies, 42 U.S.C. § 1973gg-8; (2) States must modify their driver's license application and renewal forms so that they also act as voter registration forms, 42 U.S.C. § 1973gg-3; (3) States must designate, as federal voter registration agencies, all state agencies that provide food stamps, Medicaid, services related to the Women and Infant Children program, services related to Aid to Families with Dependent Children, and agencies providing services to the disabled; (4) employees in these offices must provide "[a]ssistance to applicants in completing voter registration application forms," 42 U.S.C. § 1973gg-5(a)(4)(A); and (5) States must permit citizens to register by mail and must replace existing forms that do not meet the restrictive specifications of the Act, 42 U.S.C. § 1973gg-4.

Federal law now imposes these burdens upon California even though it is easy for Californians to register

and vote. California law has provided for voter registration by mail since 1976, with no requirement to appear before an election official; registration forms, which are pre-addressed and postage-paid by the state, are widely available at governmental and private locations. *See* Cal. Elections Code §§ 2158, 2161, 2163-64. Moreover, Californians may vote by mail. *See id.* § 12280 *et seq.*

But the Act is not, of course, limited to California; indeed, it is displacing state registration laws nationwide. Of 38 states that responded to a Federal Election Commission survey, 21 states already had some form of "motor voter" law—but they were still not in compliance with the Act. "In most cases . . . these programs were 'passive' in that voter registration forms were merly made available to clients without the active involvement of the motor vehicle clerks. They thus fell short of the full requirements of the NVRA." U.S. Federal Election Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office* 8 (1993-1994) (hereinafter *Federal Election Commission Report*).

Likewise, 13 of the 38 states offered voter registration at public assistance agencies. "But once again, most of these programs were 'passive' in that registration forms were merely made available to clients without the active involvement of the public assistance workers." *Id.*

As a result of these new and unreimbursed federal mandates, the constitutionality of the Act is not just the subject of this action, but of litigation by states across the country. Three states have unsuccessfully opposed the Act in court on constitutional grounds, including the grounds asserted by California here. *See ACORN v. Edgar*, 56

F.3d 791 (7th Cir. 1995) (Illinois); *ACORN v. Ridge*, 63 U.S.L.W. 2631, 1995 WL 136913 (E.D. Pa. Mar. 30, 1995) (Pennsylvania); *Commonwealth of Virginia v. United States* (E.D. Va. Oct. 18, 1995) (Virginia). These states have elected not to seek review of these decisions.

Moreover, in addition to California, three states now have lawsuits pending in which they assert constitutional challenges to the Act. *See ACORN v. Miller*, W.D. Mich. No. 4:95-cv-45 (Michigan); *League of Women Voters of New Hampshire v. Merrill*, D.N.H. No. 95-232-M (New Hampshire); *Condon v. Reno* (D.S.C. Nov. 20, 1995), *appeal from dismissal filed*, Nov. 30, 1995 (South Carolina).[1]

In light of the fact that seven states either are asserting constitutional challenges or have recently done so, this Court should review the decision below and provide guidance to the lower courts on the issues presented.

II. The National Voter Registration Act Commandeers State Agencies in Contravention of the Tenth Amendment

The Tenth Amendment makes explicit a relationship between the Federal government and the states that is apparent throughout the text and structure of the Constitution. The Federal government exists by virtue of delegated powers, and "[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the

---

[1] Because the Act provides for enforcement actions by both the Attorney General and private parties, 42 U.S.C. § 1973gg-9, it is very likely that additional litigation will arise as implementation of the Act continues.

States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. While the intent of the Tenth Amendment is clear, this Court has struggled at times to determine whether the Tenth Amendment imposes some *substantive* limit on congressional regulation of states. *See, e.g.*, *Maryland v. Wirtz*, 392 U.S. 183 (1968) (state schools and hospitals are subject to the Fair Labor Standards Act); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling *National League of Cities*).

In contrast, this Court has consistently held that the Tenth Amendment, in combination with the limited nature of the powers granted Congress in Article I, acts as a check on the *manner* in which Congress may implement federal programs. In *New York v. United States*, 112 S. Ct. 2408 (1992), for example, the Court concluded that the Constitution does not authorize Congress to direct the states to administer a federal regulatory program. "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 112 S. Ct. at 2421.

In *New York*, this Court invalidated a portion of a federal program on the ground that it impermissibly infringed upon state legislative authority. The Low-Level Radioactive Waste Policy Amendments Act of 1985 ("Radioactive Waste Act") created various incentives and milestones for states to establish dump sites for low-level radioactive waste. *See* 42 U.S.C. § 2021b *et seq*. The program, however, was not purely voluntary. One

provision required the States either to regulate "according to the instructions of Congress" or to take title to waste generated within their borders and indemnify its producers. Reasoning that this "enforcement" provision "would 'commandeer' state governments into the service of federal regulatory purposes," the Court struck down that part of the program as beyond the power of Congress.

At least four characteristics of the Radioactive Waste Act led the Court in *New York* to conclude that state resources had been "commandeered:" (i) compliance with the Act was mandatory; (ii) the Act required state governments to *enact* a federal legislative program; (iii) the Act required state governments to *administer* a federal regulatory program; and (iv) the Act compelled a significant expenditure of state funds.

The National Voter Registration Act conscripts state resources in furtherance of a federal voter registration scheme in the same manner that the Court found impermissible in *New York*. First, the "enforcement" provision of the Radioactive Waste Act was mandatory. States had no choice but to enact a federal regulatory program or take title to all the low-level radioactive waste generated within their borders. *See New York*, 112 S. Ct. at 2428. Likewise, the National Voter Registration Act is compulsory. The Act speaks in the imperative voice: "Each State shall establish procedures to register to vote in elections for Federal office." 42 U.S.C. 1973gg-2(a).

Second, the impermissible portion of the Radioactive Waste Act would have required state legislative action —either to enact the Federal standards or to deal with the consequences of the state's sudden ownership of low-level radioactive waste. Similarly, the National Voter

Registration Act forces state governments to designate state agencies as federal voter registration agencies and to enact legislation to comply with federal standards, including making appropriations and amending state laws. In fact, compliance with the National Voter Registration Act will require a number of states (including South Carolina, Vermont, and Virginia) to amend their constitutions. See *Federal Election Commission Report*, *supra*, at 7.

Third, the Radioactive Waste Act required state authorities to design and implement plans for compliance with the Federal program. *See* 112 S. Ct. at 2428. Similarly, the National Voter Registration Act enlists state motor vehicle and social benefits employees who previously had no election responsibilities. It requires states, *inter alia*, to modify their motor vehicle forms, provide registration assistance, and process forms within a ten-day time limit. Congress provided no federal personnel to perform any of these tasks and did not delegate responsibility for implementation to any federal agency.

Finally, in *New York*, the Court found that requiring states to take title to radioactive waste would "in principle be no different than a congressionally compelled subsidy from state governments to radioactive waste producers." *New York*, 112 S. Ct. at 2428. The National Voter Registration Act is similar but more direct. It requires the state to expend significant state funds in furtherance of federal goals. There is no question that states will be required to bear the bulk of the Act's costs, whether by direct expenditures, increased payrolls, diverted resources or some combination of all three. The only federal financial assistance provided for by the Act—reduced postal rates for certain mailings—does not nearly offset the states' burdens.

Because the National Voter Registration Act mandates a state's participation, necessitates state legislative action, enlists state personnel, and compels state expenditures, there can be little question but that it commandeers state governments. This Court "never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982). This Court should decline to do so as well.[2]

III. Article I, Section 4 Does Not Give Congress the Power to Conscript State Resources

Contrary to the contention of the United States and the private plaintiffs, Article I, Section 4 does not give Congress authority to regulate national elections by the means chosen in the National Voter Registration Act. Section 4 authorizes Congress to regulate congressional election procedures directly, not indirectly via the states. "No matter how powerful the federal interest involved, the

---

[2] Consistent with *New York*, however, Congress is free to regulate registration procedures in several familiar ways. For example, Congress could have "federalized" registration procedures for federal elections, thereby preempting state advance registration schemes. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congress in lowering minimum voting age to 18 years in national elections); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (requiring states to "consider" implementation of a Federal program). Likewise, Congress could have "encouraged" states to join in a national registration program by conditioning the receipt of related federal funds on participation. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (receipt of federal highway funds conditioned on adopting minimum drinking age).

Constitution simply does not give Congress the authority to require the States to regulate." *New York*, 112 S. Ct. at 2429.

The court below, like the Seventh Circuit, interpreted Article I, Section 4 as giving Congress power to enact the NVRA. *See* Pet. App. 8a-9a; *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995). Because the provision leaves states with responsibility for conducting elections, a process that necessarily involves *some* expenditure of resources by the state, these courts concluded—illogically—that it creates an unlimited power to impose election-related mandates on the states, no matter how costly (and no matter how unrelated to election administration are the normal duties of the conscripted state employees), as an incident of congressional authority to regulate elections.

Nothing in the drafting history of Article I, Section 4 suggests that the Framers understood it to permit such unlimited congressional commandeering, and it should not be construed to do so. Rather, like many of the structural features in the first Article, Section 4 represents a careful compromise among differing views about the power and accountability of Congress. *See* 2 J. Story, *Commentaries on the Constitution of the United States* 280-92 (1st ed. 1833). The Framers understood well that power over congressional election procedures was, in some respects, power over the nature and conduct of Congress itself. They further recognized that such procedures could be abused by either Congress or the states.

Those fearful of an excessive and unresponsive national government worried that Congress might manipulate election procedures so as to favor a certain group or class —likely themselves:

> The proposed Congress may make the whole state one district, and direct that the capitol (the city of New York, for instance) shall be the place for holding the election; the consequence would be that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class.

Brutus, No. 4, Nov. 29, 1787, in 2 Philip Kurland & Ralph Lerner, *The Founders' Constitution* 251 (1987).

On the other hand, ardent Federalists like Madison and Hamilton believed that the power to regulate elections must be vested at least in part with Congress. Otherwise, the states might manipulate the rules to advance their own parochial interests or to subvert the national government by refusing to hold elections altogether. Defending the scheme of shared power embodied in Article I, Section 4, Hamilton wrote:

> [E]very government ought to contain in itself the means of its own preservation . . . . Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs.

The Federalist No. 59, at 168 (Alexander Hamilton) (Roy P. Fairfield, ed. 1966).

In view of these competing concerns, the Framers adopted a compromise. Article I, Section 4 states that:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators.

The result of this compromise is that states hold primary authority to regulate the conduct of congressional elections. Congress, however, may preempt or supplement any state regulation it deems unsatisfactory. *See Oregon v. Mitchell*, 400 U.S. 112, 122-23 (1970).

The compromise in Article I, Section 4 is significant. By explicitly creating a scheme of shared powers, the Framers ensured that if one body attempts to abuse election procedures, there will likely be an automatic constituency to resist. Thus, Justice Story presumed that the Article I, Section 4 power would "not be resorted to by Congress until there has been some extraordinary abuse or danger." *See* 2 Story, *Commentaries* 293, 299. Moreover, an intentional scheme of shared powers casts a long shadow of doubt on any claim that congressional power in Article I, Section 4 is so vast as to override the provisions and structure of federalism found in the Constitution.

The Court in *New York* confirmed the historical view of Article I, Section 4: Regardless of the source of federal

authority or the strength of the federal interest, Congress may not commandeer. In defense of the National Voter Registration Act, Respondents argue that because Article I, Section 4 authorizes Congress to regulate election registration procedures, the Act must be constitutional. This simple syllogism ignores the Court's holding in *New York*, which rejected that precise argument.

In *New York*, the United States contended that "the Constitution's prohibition of congressional directives to state governments can be overcome where the federal interest is sufficiently important to justify state submission." 112 S. Ct at 2429. The Court unequivocally repudiated that suggestion:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

112 S. Ct. at 2429.

There is no reason to distinguish the holding in *New York* from the present case because the impermissible congressional action there was promulgated pursuant to the commerce clause. First, from a historical viewpoint it is hard to imagine a broader base of congressional power than the commerce clause. According to Professor Tribe, "[t]he

Commerce Clause is both the chief source of congressional regulatory power and, implicitly, a limitation on state legislative power." Laurence H. Tribe, *American Constitutional Law* 305-06 (2d ed. 1988).

Second, there is no textual indication that the Framers gave Congress broader powers to enact commandeering legislation under the Time, Place and Manner Clause than under the Commerce Clause. The only direct interference with state prerogatives that Article I, Section 4 allows is the "alter[ation]" of a state law regulating certain aspects of federal elections. The National Voter Registration Act does much more than merely "alter" existing state registration laws, in view of its conscription of state agencies and state employees, whose responsibilities were outside the elections sphere that Congress is authorized to regulate, to administer the federal program.

Finally, the congressional acts that this Court has upheld in the face of a Tenth Amendment challenge, such as the Fair Labor Standards Act provisions at issue in *Garcia*, did not possess the attributes of commandeering. For example, in *Garcia*, the Court upheld application of the Fair Labor Standards Act's minimum wage and overtime obligations to state mass-transit systems. *See* 469 U.S. 528. The minimum wage and overtime provisions, however, did not on their face require specific state agencies to administer them nor the enacting of state legislation. The minimum wage and overtime provisions required nothing more than an accounting change. Moreover, at the same time that Congress extended these obligations, Congress also "provided substantial countervailing assistance . . . that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area." *Id.* at

554. For these reasons, the Commerce Clause cases permitting regulation of states are inapplicable.

In sum, Article I, Section 4 authorizes Congress to regulate congressional elections in the event that Congress finds some aspect of a state scheme wanting. The congressional authority to regulate national elections, however, does not include the greater power to command the states to administer election registration in accordance with a federal program. *New York* plainly imposes a limitation on the *manner* by which Congress may exercise its authority. Article I, Section 4 should not be construed to authorize the commandeering of state agencies that do not engage in the matters Congress is authorized to regulate, thus upsetting a state's sovereign power to delineate the responsibilities of its own agencies. Because the National Voter Registration Act possesses all of the attributes of commandeering, it should be held to violate Article I and the Tenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. POPEO
DAVID A. PRICE
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

Date: December 12, 1995

(3)

Supreme Court, U.S.
FILED
DEC 22 1995
CLERK

No. 95-673

In The
Supreme Court of the United States
October Term, 1995

Pete Wilson, Governor of the State of California; et al.,
Petitioners,

vs.

Voting Rights Coalition; et al.,
Respondents,

Pete Wilson, Governor of California; State of California,
Petitioners,

vs.

Janet Reno, U.S. Attorney General; United States of America,
Respondents.

**On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

BRIEF OF AMICUS CURIAE SHERIFF JAY PRINTZ IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, VA 22030
(703) 352-7276
Attorney for Amicus Curiae
*Counsel of Record

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. IDENTITY AND INTEREST OF AMICUS CURIAE 1

II. SUMMARY OF ARGUMENT 3

III. REASONS FOR GRANTING THE PETITION . 3

A. Certiorari Should Be Granted to Define Further the Contours of Power Reserved to the States Under the Tenth Amendment and Resolve the Important Question of Whether the Constitution Permits the Federal Government to Commandeer State Employees to Administer a Federal Program 3

B. Certiorari Should be Granted to Clarify Whether the Conscription Doctrine of *New York* is Limited to Intrusion Into State Affairs by Federal Programs Justified under the Commerce Clause 7

IV. CONCLUSION 9

TABLE OF AUTHORITIES
FEDERAL CASES

CASES — Pages

Frank v. *United States*, 860 F. Supp. 1030 (D.Vt.1994) 2
Koog v. *United States*, 852 F. Supp. 1376 (W.D.Tex.1994) 2
Mack v. United States, 66 F.3d 1025 (9th Cir. 1995) . . . . . passim
McGee v. *United States*, 863 F. Supp. 321 (S.D.1994) . 2
New York v. *United States*, 112 S. Ct. 2408 (1992) . . . . . passim
Romero v. *United States*, 883 F. Supp. 1076 (W.D.La.1995) 2
Voting Rights Coalition v. *Wilson*, 60 F.3d 1411 (9th Cir. 1995) 7

U.S. CONSTITUTION

Article I 3, 7
Article I, section 4 . . . . . .7, 8
Article I, section 8, clause 1 8
Article I, section 8, clause 3 8
Article VI, clause 2 8
Tenth Amendment . . . . . passim

FEDERAL STATUTES

Brady Handgun Violence Protection Act, Pub. L. No. 103-159, §102, 107 Stat. 1536 (1993) . . . 1, 2, 3, 4, 5, 9
18 U.S.C. § 922(s)(2) 4
18 U.S.C. § 922 (s)(3)(B) 4
42 U.S.C. § 1973gg-5(a)(6)(B) 4
42 U.S.C § 1973gg-8 4

Pursuant to Supreme Court Rule 37, Sheriff Jay Printz submits this brief *amicus curiae* in support of the petition for certiorari filed by California Governor Pete Wilson in the above-entitled matter. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Jay Printz is the duly elected Sheriff of Ravalli County, Montana and a named Appellant/Cross-Appellee in *Mack, Printz v. United States*, 66 F.3d 1025 (9th Cir.1995)(petition for rehearing with suggestion for rehearing *en banc* filed October 19, 1995).[1] *Amicus* is, at present, challenging the validity of the Brady Handgun Violence Protection Act, Pub.L. No. 103-159, § 102, 107 Stat. 1536 (1993) ("Brady Act") under the Tenth Amendment to the United States Constitution because the Brady Act has imposed mandatory federal duties upon state officials in order to implement a program with its genesis in an act of Congress. In his challenge to the Brady Act, *amicus* argues that as a state official, he has been commandeered by the federal government in violation of this Court's

---

[1] *Jay Printz, Sheriff/Coroner, Ravalli County, Montana v. United States of America*, Nos. 94-36193, 95-35037 (on appeal from the United States District Court for the District of Montana--Missoula Division, No. CV-94-35-CCL). The appeal of Sheriff Printz was consolidated in the Ninth Circuit with that of *Richard Mack, Sheriff of Graham County, Arizona, v. United States of America*, Nos. 94-16940, 94-17002 (on appeal from the United States District Court for the District of Arizona, D.C.No. CV-94-00113-JMR). The petition for certiorari refers to the consolidated appeals as *"Mack,"* and that form will remain consistent here.

pronouncement in *New York v. United States*, 112 S.Ct. 2408 (1992).

Likewise, California's petition for certiorari in the instant proceeding, challenging the constitutionality of the National Voter Registration Act ("NVRA" or the "Motor Voter" Act) asks the Court to resolve important issues about the power of the federal government to conscript state officials to administer a federal program. Accordingly, *amicus* has a keen interest in this case. The presently-pending Ninth Circuit case brought by Sheriff Printz and Sheriff Mack, in addition to several other pending challenges to the Brady Act brought by his colleagues,[2] will be directly impacted should this Court grant certiorari and decide the questions presented in this matter.

As with the petitioner here, Sheriff Printz has relied on *New York v. United States* in an attempt to fend off interference with the execution of his official state duties. *Amicus* believes the Court should grant certiorari in this case to clarify questions of exceptional importance, specifically: 1) the extent to which Congress may conscript state employees to assume federal duties and administer a federal program; and 2) the reach of this Court's ruling in *New York v. United States*, that the Federal Government may not compel the States to enact or administer a Federal program (upon which *amicus* as well as petitioners in this case have

---

[2] *See Romero v. United States*, 883 F.Supp 1076 (W.D.La.1995); *Frank v. United States*, 860 F.Supp. 1030 (D.Vt.1994); *McGee v. United States*, 863 F.Supp. 321 (S.D.1994); *Koog v. United States*, 852 F.Supp. 1376 (W.D.Tex.1994). The cases brought by Sheriffs McGee and Koog are on appeal to the Fifth Circuit and were argued June 7, 1995.

relied).

II. SUMMARY OF ARGUMENT

New York v. United States, 112 S.Ct. 2408 (1992), held that Congress may not compel the States to enact or administer a federal regulatory program, even where Congress has been granted the power to legislate over that subject matter. Congress is delegated specifically enumerated rights under Article I of the Constitution, and all powers not so delegated are reserved to the States or to the people respectively under the Tenth Amendment.

The National Voter Registration Act is one of several recent Congressional enactments, such as the Brady Act, which conscripts State or local officials and employees to administer federal programs. The Brady Act requires local law enforcement officers to administer a portion of the federal Gun Control Act.

These enactments are beyond the scope of the powers delegated by Article I and violate the residual sovereignty of the States reserved under the Tenth Amendment. This Court should grant certiorari in order to exposit and explain further the limits of federal power as previously set forth in *New York v. United States.*

III. REASONS FOR GRANTING THE PETITION

A. Certiorari Should Be Granted to Define Further the Contours of Power Reserved to the States Under the Tenth Amendment and Resolve the Important Question of Whether the Constitution Permits the Federal Government to Commandeer State Employees to Administer a Federal Program

The statutory framework of the Brady Act and the NVRA are strikingly similar. First, each Act conscripts one or more state officials to become the responsible parties for executing the federal commands. In the case of the Brady Act, it is the chief law enforcement officer ("CLEO") who must ascertain whether receipt or possession of a handgun is in violation of law, 18 U.S.C. § 922(s)(2). Under the NVRA, each state is commanded to designate a "State officer or employee as the chief State election official [("CSEO")] to be responsible for coordination of State responsibilities under this Act." 42 U.S.C. § 1973gg-8. Second, each chief official is required to utilize federally-prescribed forms by which to discharge the new duties commanded of them.[3]

In *New York v. United States*, this Court established without qualification that "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government." *New York*, 112 S.Ct. 2408, 2434 (1992). In the case of the Motor Voter Law, Congress has conscripted states agencies, whose duties were unrelated to elections, as administrative agencies of the federal government to administer a federal registration program. In *amicus*'s case challenging the Brady Act, Congress has

---

[3] In the case of a CLEO under the Brady Act, the form must contain certain information that the handgun transferee is not in violation of federal law by possessing a handgun. 18 U.S.C. § 922(s)(3)(B). Likewise, under the NVRA, the CSEO must make available forms that include statutorily-prescribed verbiage that informs the prospective registrant that "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME." 42 U.S.C. § 1973gg-5(a)(6)(B).

required chief law enforcement officers created by State law to administer federal background checks for handgun transferees.

Yet, in passing on the Tenth Amendment challenge by Sheriff Printz to the Brady Act, the Ninth Circuit in *Mack* shrugged off this commandeering and noted in passing that

> there is likely to be *some point* at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. [Sheriff] Printz [has] not demonstrated that the Act will *interfere unduly* with [his] duties.

Mack, 66 F.3d at 1032 (emphasis supplied). In the Ninth Circuit's view, the federal government does not unduly interfere with state sovereignty until it shuts it down. Yet, the Ninth Circuit never illuminated the "point" at which "undue interference" blossoms into a viable claim under the Tenth Amendment -- an amorphous standard that hardly serves the federal-state balance established by the Constitution. It merely held that the Federal Brady Act may compel local officials to administer a federal program, despite this Court's clear directive that "[t]he federal government may not compel the States to enact or administer a federal regulatory program," *New York*, 112 S.Ct. 2408,

2435 (1992).

Indeed, the Ninth Circuit has taken a very narrow view of *New York*: that the case *"is best read"* as holding that "the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government," *Mack*, 66 F.3d at 1030 (emphasis supplied). The Ninth Circuit opined that this Court must have meant in *New York* that the protection of the Tenth Amendment is only afforded state officials compelled to administer *"in the sense* of being in charge of a program and making policy decisions with respect to the program." *Id.* at 1031 n. 7 (emphasis supplied). Accordingly, the Ninth Circuit has taken the position that, unless a policy-making state official is compelled to enact laws or promulgate regulations in accordance with federal standards, the federal government is free to enact laws which utilize state officials as federal administrators - regardless of the scope of state officials' existing job duties, or their resources to perform those duties. According to the Ninth Circuit, Sheriff Printz does not "administer" a "program," and thus *New York* is to be distinguished from his case.

The Ninth Circuit's narrow reading of *New York* highlights the urgency for this Court to settle earlier, rather than later, whether the federal government may commandeer state employees. If so, in an era of tight federal budgets, Congress will have found a new set of employees -- state officials -- on its organization chart for purposes of administering federal programs for which Congress appropriates no funding.

B. Certiorari Should be Granted to Clarify Whether the Conscription Doctrine of *New York* is Limited to Intrusion Into State Affairs by Federal Programs Justified under the Commerce Clause

This Court recognized in *New York* that, respecting whether a power is granted to Congress in Article I or whether it is reserved to the States by the Tenth Amendment, "the two inquiries are mirror images of each other." 112 S.Ct. 2408, 2417 (1992). This Court described its mission in *New York* as no less than a determination of "whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 2418.

Notwithstanding the expanse of this horizon, the Ninth Circuit, in response to California's challenge to the Motor Voter Law, narrowly characterized *New York* as holding that "Congress could not impose on the states the burden of exercising its power under the Constitution to regulate *interstate commerce*," *Voting Rights Coalition* v. *Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995) (emphasis supplied). The court thereby rendered the invigoration of the Tenth Amendment in *New York* entirely impotent to protect state sovereignty from infringement from a federal statutory scheme premised on Article I, section 4. According to the Ninth Circuit, the Tenth Amendment interest asserted by California does no more than act as a feeble, unenforceable request that the Federal Government's conscription of state employees be "done sensitively." *Id.* at 1416.

An important question presented by this petition is whether courts may be permitted to portray *New York* in so limited a fashion. The holding below is that *New York*'s

pledge that "the Constitution simply does not give Congress the authority to require the States to regulate," *New York*, 112 S.Ct. 2408, 2429 (1992), is limited to the Commerce Clause and does not extend to Article I, section 4. However, *New York* offered no such explicit contingencies on state sovereignty hinging on the Tenth Amendment.[4]

Moreover, the Ninth Circuit in *Mack* took another approach to further narrow *New York's* holding. Since it was not in a position to avoid *New York's* ruling on the ground that it was a Commerce Clause case, the Ninth Circuit held that federal conscription of state officials passes constitutional muster under the Tenth Amendment if the newly imposed duties are not "alien" to the official's "usual" line of work, and represent a "minimal" interference with state functions. 66 F.3d at 1031. The justification for this novel "minimal-interference" test is presumably Congress's expansive power under the Commerce Clause. But the Motor Voter Act would be a violation of the Tenth Amendment under the Ninth Circuit's reasoning in *Mack* because voter registration duties have never been the province of the California Department of Motor Vehicles and are thus "alien" to the agency's usual line of work, namely

---

[4] Indeed, this Court pointed out in *New York* that the interests asserted by a state under the Tenth Amendment must still be weighed against three seemingly-insatiable conferred powers on the Federal Government, specifically the Commerce Clause under Article I, section 8, clause 3; the Spending Clause under Article I, section 8, clause 1; and the Supremacy Clause under Article VI, clause 2. *New York v. U.S.* at 112 S.Ct. 2408, 2419 (1992). Such calibration is required because "[t]he actual scope of the Federal Government's authority with respect to the states has changed over the years ... but the constitutional structure underlying and limiting that authority has not." *Id*

vehicle and driver licensing.

If *Mack* is a proper transmutation of this Court's decision in *New York*, then "the conscription of state employees in the present case goes well beyond the circumstances in the Brady Act. ... Here, ... employees of the [California] State Department of Motor Vehicles and state public assistance agencies are being commandeered to perform federal registration duties wholly outside their 'usual line of work' and to administer Motor Voter's registration program on state time." Petition for Certiorari at 22.

Like the petitioner, *amicus* does not argue in his pending Brady Act challenge that the Federal Government is completely powerless to regulate the subject of the federal statutory scheme. The objection to the federal impairment of state duties lies in the attempt by Congress to circumvent its obligation to directly regulate and administer a program. The Ninth Circuit has failed in this and other instances to accord any weight whatsoever to the "core of sovereignty retained by the States under the Tenth Amendment," 112 at S.Ct. 2408, 2419 (1992), as required by *New York*. On this basis, the petition for certiorari should be granted.

IV. CONCLUSION

Based on the foregoing, a*micus curiae* Sheriff Jay Printz respectfully requests that the petition for certiorari in this matter be granted.

Dated December 22nd, 1995

Respectfully submitted,

Stephen P. Halbrook*
10560 Main St., Suite 404
Fairfax, Virginia 22020

Attorney for Amicus Curiae

*Counsel of Record

Supreme Court, U.S.
FILED
DEC 26 1995
CLERK

No. 95-673

In The

Supreme Court of the United States

October Term, 1995

PETE WILSON, Governor of the State of California, et al.,

Petitioners,

v.

VOTING RIGHTS COALITION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MARK ROSENBAUM
KARL MANHEIM
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

STEVE SHAPIRO
ACLU
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ROBERT RUBIN
Counsel of Record
THEODORE H. WANG
NANCY M. STUART
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
301 Mission Street, Suite 400
San Francisco, California 94105
(415) 543-9444

EVAN CAMINKER
UCLA SCHOOL OF LAW
405 Hilgard Avenue
Los Angeles, California 90024
(310) 206-7323

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

QUESTION PRESENTED

Whether U.S. Const., Art. I, § 4, which grants to Congress supervisory authority to make or alter state regulations of federal elections, authorizes the enactment of the National Voter Registration Act, which regulates states' procedures for voter registration for federal elections.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

STATEMENT OF THE CASE 1

A. Background 1

B. Procedural History 2

C. Legislative History of the NVRA 2

D. Statement of Facts 4

E. Implementation of the NVRA 7

SUMMARY OF ARGUMENT 9

ARGUMENT 11

A. IN ENACTING THE NVRA, CONGRESS ACTED SQUARELY WITHIN ITS POWER TO REGULATE FEDERAL ELECTIONS UNDER ARTICLE I, SECTION 4 11

1. Supreme Court precedent consistently upholds Congress' exercise of its supervisory power over federal elections under Article I, Section 4 11

2. The plain language of Article I, Section 4 expressly authorizes Congress' enactment of the NVRA 16

3. The legislative history of Article I, Section 4 permits regulations by both federal and state governments, but makes any federal regulation paramount 20

TABLE OF CONTENTS – Continued

Page

B. IN VIEW OF THE UNBROKEN LINE OF CASES ESTABLISHING CONGRESS' AUTHORITY OVER FEDERAL ELECTIONS, THIS CASE PRESENTS NO SUBSTANTIAL TENTH AMENDMENT QUESTION 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Association of Community Organizations for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7th Cir. 1995) ..... *passim*

Association of Community Organizations for Reform Now (ACORN) v. Edgar, 880 F.Supp. 1215 (N.D. Ill, 1995) 11, 18

Ex Parte Clark, 100 U.S. (10 Otto) 399 (1879) 12

EEOC v. Wyoming, 460 U.S. 226 (1983) 25

Garcia v. San Antonio Met. Transit Auth., 469 U.S. 528 (1985) 25, 28

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 25, 28

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 23, 27

National Mutual Insurance Co. v. Tidewater Transfer Co, 337 U.S. 582 (1949) 27

New York v. United States, 505 U.S. 144 (1992).. *passim*

Newberry v. United States, 256 U.S. 232 (1920) 21, 22, 25

Oregon v. Mitchell, 400 U.S. 112 (1970)..... *passim*

Perez v. United States, 402 U.S. 146 (1971) 23

Puerto Rico v. Branstad, 483 U.S. 219 (1987)..... 26

Reynolds v. Sims, 377 U.S. 533 (1964) 2

Ex Parte Siebold, 100 U.S. (10 Otto) 371 (1879) ..... *passim*

Smiley v. Holm, 285 U.S. 355 (1932)..... *passim*

TABLE OF AUTHORITIES – Continued

Page(s)

U.S. Term Limits, Inc. v. Thornton, 514 U.S. ___, 115 S.Ct. 1842 (1995) ..... *passim*

United States v. Classic, 313 U.S. 299 (1941).. 12, 13, 16

United States v. Gradwell, 243 U.S. 476 (1917) 13, 15, 17, 22

United States v. Lopez, 514 U.S. ___, 131 L.Ed.2d 626 (1995) 26

United States v. Manning, 215 F.Supp. 272 (W.D. La. 1963) 29

United States v. Mosley, 238 U.S. 383 (1915)..... 13, 16

Voting Rights Coalition v. Wilson 60 F.3d 1411 (9th Cir. 1995) ..... *passim*

Wesberry v. Sanders, 376 U.S. 1 (1964) 16

Wilson v. United States, 878 F.Supp. 1524 (N.D. Cal. 1995) 11

Ex Parte Yarbrough, 110 U.S. 651 (1883)..... 16, 28

DOCKETED CASES

Association of Community Organizations for Reform Now (ACORN) v. Miller, Nos. 4:95-CV-45, 1:95-CV-184, 1:95-CV-386 (W.D. Mich. Dec. 13, 1995) 11, 18

Association of Community Organizations for Reform Now (ACORN) v. Ridge, Civ. Action Nos. 94-7671, 95-382 (E.D.Penn. Mar. 30, 1995) 11, 18

Commonwealth of Virginia v. United States, Civ. Action No. 3:95CV357 (RLW) (E.D.Va. Oct. 18, 1995) 11, 18

TABLE OF AUTHORITIES – Continued

Page(s)

Condon v. Reno, Civ. Action No. 3:95-192-O (Nov. 20, 1995 D.S.C.; amended Dec. 12, 1995) 7, 11, 18

League of Women Voters of Kansas v. Graves, Case No. 95-2350-KHV (D. Kan. Nov. 30, 1995) 11, 18

STATUTES/CONSTITUTIONS

U.S. Const. Art I, § 2 21

U.S. Const. Art I, § 3 21

U.S. Const. Art. I, § 4 ..... *passim*

U.S. Const. Art. I, § 8, cl. 3 25

U.S. Const. Art. I, § 8, cl. 16 26

U.S. Const. Art. I, § 10, cl. 2 26

U.S. Const. Art. II, § 1, cl. 4 26

42 U.S.C. § 1973gg, et seq. ..... *passim*

Enforcement Act of 1870, 16 Stat. 140, 16 Stat. 254 12

LEGISLATIVE HISTORY

H.R. Rep. No. 103-9, 103rd Cong., 1st Sess. (1993) .. *passim*

S. Rep. No. 103-6, 103rd Cong., 1st Sess. (1993) 1, 3, 4

Records of the Federal Convention, vol. 3 (Farrand) 22

OTHERS

Clearing the Road for 'Motor Voter', L.A. Times, Jan. 8, 1995, at M4 ..... 6, 8

J. Story, *Commentaries on the Constitution of the United States*, 280-292 (1st ed. 1883) 21, 22

TABLE OF AUTHORITIES – Continued

Page(s)

Don't Kill Off 'Motor Voter', Buffalo News, Feb. 1, 1995 at 2 6

The Federalist No. 59, (Alexander Hamilton) 21

The Federalist No. 60, (Alexander Hamilton) 21, 22

B. Drummond Ayers, Jr., *Law to Ease Voter Registration Has Added 5 Million to the Rolls*, N.Y. Times, Sept. 3, 1995, § 1 at 1 8

The Middle Class that 'Matters Most', San Francisco Chronicle, Dec. 30, 1994, at A23 8

300,000 Motor Voters, San Francisco Chronicle, Dec. 9, 1995, at A21 9

Frank Reeves & Peter J. Shelly, *Motor-Voter Law Helps GOP Most*, Pittsburgh Post-Gazette, Nov. 5, 1995, at A15 9

The Motor Voter Act: Pleasant Surprises, Phoenix Gazette, Sept. 9, 1995, at B8 9

Maryland GOP Benefiting from 'Motor Voter' Law, Baltimore Sun, June 15, 1995, at 1B 9

Human SERVE, *The National Voter Registration Act, January through September 1995* 9

Margaret L. Usdansky, *States Stall on 'Motor Voter'*, USA Today, Dec. 22, 1994, at 4A 6

Beverly Sheldrake, *Wilson Votes No*, Fresno Bee, Dec. 31, 1994 at B4 6

STATEMENT OF THE CASE

A. Background

Congress enacted the National Voter Registration Act of 1993 ("NVRA") in order to establish uniform nondiscriminatory voter registration "procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). Consistent with Congress' objectives, the overwhelming majority of states have now implemented this legislation with resounding success. Over five million new voters, of diverse backgrounds and political affiliations, have been added to the rolls.

Every judge from every court to consider the question has concluded without difficulty that the NVRA is constitutional. The State of California nevertheless persists in its challenge, despite over a century of Supreme Court precedent that squarely and consistently upholds Congress' broad authority to regulate federal elections. Article I, Section 4 of the Constitution, while recognizing that the States play a role in regulating federal elections, explicitly empowers Congress "at any time" to "make or alter such Regulations" as it deems appropriate. In an unbroken string of decisions, dating back to *Ex Parte Siebold*, 100 U.S. (10 Otto) 371, 392 (1879), this Court has held that Article I, Section 4 vests in Congress "paramount" authority to regulate federal elections.

Expressly pursuant to this settled authority, Congress enacted the NVRA. Declaring that "the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority," Congress established uniform nondiscriminatory registration standards. *See* S. Rep. No. 103-6, 103rd Cong., 1st Sess. 3 (1993). The NVRA provides that states requiring advance registration to vote in federal elections must provide for registration by (1) mail-in application, (2)

simultaneous application with driver's license or state ID card applications or renewals, and (3) application at disability and public assistance agencies. 42 U.S.C. §§ 1973gg-2 to 1973gg-5. The NVRA also describes procedures and standards governing the maintenance of voter registration rolls. 42 U.S.C. § 1973gg-6. Covered states were generally required to comply with the NVRA by January 1, 1995. 42 U.S.C. § 1973gg note.

Through the NVRA, Congress informs the states that if they choose to mandate advance registration for federal elections, which they are not required to do, they must implement specified registration procedures. The NVRA promotes the straightforward concept that voter registration is simply a matter of maintaining lists. Recognizing that states already maintain lists at motor vehicle and public assistance offices, the NVRA directs that those agencies assist in the voter registration process.

B. Procedural History

Respondents agree generally with Petitioners' statement of "The Proceedings Below" set forth at pages 7-11 of the Petition. Respondents note that, with the exception of South Carolina, those few other states listed by the Petitioners as having challenged the constitutionality of the NVRA have since abandoned their challenges.

C. Legislative History of the NVRA

The right to vote is a fundamental right under our Constitution. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Through the NVRA, Congress sought to protect this fundamental right and to address the nationwide problem of discriminatory and unfair voter registration procedures for federal elections. 42 U.S.C. § 1973gg. The NVRA's legislative history and text both demonstrate a purpose to

make registration more accessible. Finding that voter registration is the single most important factor governing voter turnout and that contemporary registration rates are abysmally low, the Senate concluded:

> [R]egistration procedures in the United States are not uniform and [ ] discriminatory and restrictive practices that deter potential voters are employed by some states. . . . The Voting Rights Act of 1965 made most of these restrictive practices illegal, yet discriminatory and unfair practices still exist and deprive some citizens of the right to vote. This legislation will provide uniform voter registration for Federal elections and thereby further the procedural reform intended by the Voting Rights Act.

S. Rep. No. 103-6, 103rd Cong., 1st Sess. 3 (1993).

The House echoed the Senate's conclusion. Determining that existing local voter registration laws were, in some instances, just as restrictive and discriminatory as the unlawful practices prohibited by the Voting Rights Act of 1965, the House Report stated that the NVRA was needed to reduce "obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, 103rd Cong., 1st Sess. 3 (1993).

The findings and purposes set forth in the Act also recognize the significant public interest in increasing voter participation. Noting that discriminatory and unfair registration laws have a "direct and damaging effect on voter participation" in federal elections, the NVRA states that its objectives are to increase the rate of voter registration, enhance voter participation in federal elections, and "protect the integrity of the electoral process." 42 U.S.C. § 1973gg(a) & (b).

D. Statement of Facts

The overwhelming majority of states have recognized the laudatory purposes of the NVRA as well as Congress' power to legislate in this area and, accordingly, have faithfully implemented this legislation. But, as the district court noted: "The State of California and Governor Wilson [took] actions . . . tantamount to failure to comply with the NVRA." App. at 251.[1]

Recognizing that preparation for implementing the NVRA would take considerable time, then-Acting Secretary of State Tony Miller sent the Governor a letter on January 31, 1994, warning that California was in danger of not meeting the January 1, 1995, deadline because it had yet to develop an implementation plan. *See* App. at 65-66. At about the same time, the California Department of Motor Vehicles ("DMV") cautioned the Governor that the state was running out of adequate preparation time for implementing the NVRA. *See* App. at 68-72.

Despite these advance warnings, the State failed to develop a comprehensive plan for implementing the NVRA. Nor did it seek any judicial resolution of the law's constitutionality. Instead, in August 1994, the Governor issued an Executive Order directing state officials not to comply with the NVRA except "to the extent federal funding is made available."[2] App. at 57-58. Meanwhile, in

---

[1] All appendix references are to the Appendix of Appellees Voting Rights Coalition, et al., filed with the Ninth Circuit on appeal from the district court's order granting a permanent injunction.

[2] To facilitate state compliance with the NVRA, Congress provided for federal agencies to partially reimburse states for the costs of implementing the Act at public assistance agencies. *See* H.R. Rep. No. 103-9, at 23-25; S. Rep. No. 103-6, at 39-41. The U.S. Department of Health and Human Services and the U.S.

an attempt to comply with the NVRA, the California legislature passed two related bills. App. at 74-75, 77-78. The bills would have established, *inter alia*, procedures for registering voters at DMV and other state agencies; procedures for removing individuals from voter rolls in a nondiscriminatory manner; and procedures for allowing voters who have moved within the same congressional district to vote without re-registering. The Governor vetoed both bills on September 30, 1994. *See* App. at 80-81.

Through his Veto Statements and Executive Order, the Governor made clear that the State would not comply with the NVRA unless it was fully federally funded. *See* App. at 57-58, 80-81. The Court of Appeals, however, concluded that the question of federal funding has no relevance to the NVRA's constitutionality. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995).

Moreover, the evidence soundly refutes California's estimates of the NVRA's costs and reveals that the State has failed to consider altogether the substantial savings that will result from the NVRA. Petitioners allege that the cost of implementation will be $18 million and that "Respondents did not present any admissible evidence to contest this figure." Pet. at 7. That statement is false. Respondents introduced ample admissible evidence at the district court controverting the State's allegation, including a statement from Petitioners' then-Acting Secretary of State who estimated the total costs at $5 million. App. at 105. Petitioners' cost projection, which has varied

---

Department of Agriculture have subsequently issued action transmittals that allow states to receive reimbursements for registering voters under federally funded (AFDC, Food Stamps, and Women, Infants and Children (WIC)) welfare programs. *See* App. at 60-61, 63.

over time by as much as $32 million,[3] is also grossly out of proportion to the actual experience of states already implementing the NVRA.[4] In any event, Petitioners neither sought nor received any finding to support their inflated cost estimates.

In addition to overestimating the costs of the NVRA, Petitioners completely overlook the significant savings that its implementation will generate. As the experience of other states demonstrates, the procedures prescribed by the NVRA allow registration to be conducted much more cheaply than would otherwise be possible.[5] The

---

[3] *See, e.g.*, Beverly Sheldrake, *Wilson Votes No*, Fresno Bee, Dec. 31, 1994, at B4 ("Wilson says he'd be glad to comply if, in the words of a press spokesman, 'they send us $36 million.' "); *Don't Kill Off 'Motor Voter'*, Buffalo News, Feb. 1, 1995, at 2 (Wilson estimates NVRA will cost California $50 million per year); *Clearing the Road for 'Motor Voter'*, L.A. Times, Jan. 8, 1995, at M4 ($20 million); Margaret L. Usdansky, *States Stall on 'Motor Voter'*, USA Today, Dec. 22, 1994, at 4A ($35.8 million).

[4] Some states have implemented the NVRA without making any new appropriations, App. at 107-09 (Arizona, Maine, New Mexico, Ohio, Texas), while others have made relatively modest appropriations. For example, New York budgeted $2.5 million for the first year of implementing the NVRA; while Florida appropriated $1.1 million; Georgia, $1.9 million; Massachusetts, $6 million; and New Jersey, $3.5 million. *Id.* Start-up costs, such as establishing new computer systems, constitute the most significant outlay, while operating costs are significantly less. App. at 111-12 (start-up and software formed Georgia's initial costs, operational costs in the future will be much less); App. at 149 (of Kentucky's $650,000-$700,000 of expenditures for the NVRA, $575,000 was spent on reprogramming state's computer system); App. at 119-20 (costs of introduction form bulk, continuing expenses minimal). Consequently, the cost of complying with the NVRA should decrease over time.

[5] There are several factors that contribute to these savings. First, the cost per transaction under the NVRA's registration

failure to consider these savings exposes the State's estimates to the same criticism levelled at the State of South Carolina by a district court. *Condon v. Reno*, Civ. Action No. 3:95-192-O (Nov. 20, 1995 D.S.C.; amended Dec. 12, 1995). While recognizing that "cost is not the touchstone in this constitutional confrontation," the court found that South Carolina's "failure even to attempt to examine possible offsetting savings – or even possible net savings overall – seriously undermines [the state's] claimed fiscal concerns about the NVRA." *Id.*, amd. slip op. at 24. Petitioners in this case likewise disregard any savings that will derive from implementation of the NVRA.

E. Implementation of the NVRA

By enacting the NVRA, Congress sought to serve the public interest by eliminating barriers to voter registration and, at the same time, to protect the integrity of the federal electoral process. 42 U.S.C. § 1973gg(b); H.R. Rep.

---

procedures is much less than the traditional methods. In Washington State, where the cost per transaction used to be $2.00-$3.00, it is now $0.41 per transaction. App. at 107, 124. In Minnesota, the cost per transaction is $0.33; in Montana it is $0.25; and in the District of Columbia it is $0.18. App. at 107. Second, because voter registration under the NVRA occurs year-round and registers the vast majority of the eligible electorate, states will be able to reduce, if not eliminate, the part-time workers they typically must hire to handle last-minute pre-election registration. The CBO estimates that "local officials nationwide could save about $10 million in a presidential election year and about $7 million in non-presidential election years by reducing part-time hires." H.R. Rep. No. 103-9, at 28-29. Third, the U.S. Department of Health and Human Services and U.S. Department of Agriculture will reimburse State NVRA costs at the 50% federal match rate for AFDC, WIC, and Food Stamps applicants. App. at 60-61, 63.

No. 103-9, at 3. The people of California possess a profound interest in seeing these goals achieved. This State has one of the lowest voter registration rates in the country.[6] Its record of minority voter participation is especially poor. *See* Cloward Decl. ¶ 10 (filed in support of Plaintiffs' Motion for Preliminary Injunction, Jan. 27, 1995). Despite having one of the most diverse populations in the nation, California's electorate remains relatively homogenous.[7]

In enacting the NVRA, Congress specifically recognized that the integrity and legitimacy of the democratic process depend on the broad inclusion of as many eligible persons as possible. As noted by Professor Richard Cloward, a voting expert at Columbia University, the NVRA clearly furthers this interest:

> Eight states and the District of Columbia had their own motor voter programs in place at least 9 months before the 1992 federal election, well before the NVRA was passed. The positive impact on voter registration rates and voter turnout in those jurisdictions was enormous. Their aggregate registration increased at a rate five times higher than in other states, and their voter turnout increase was almost twice the increase in other states.

Cloward Decl. ¶ 8 (parentheticals omitted).

---

[6] Voting and Registration in the Election of November 1992, Current Population Reports, U.S. Bureau of the Census, Series P-20; *Clearing the Road for 'Motor Voter'*, L. A. Times, Jan. 8, 1995, at M4; Cloward Decl. ¶ 10; App. at 137-38.

[7] California is only 54% white, but over 80% of the voters at the November 8, 1994 general election were white. Ben Sherwood, *The Middle Class That 'Matters Most'*, San Francisco Chronicle, Dec. 30, 1994, at A23.

Most states are almost one year into their implementation of the NVRA and there can be little doubt of the Act's overwhelming success. Over five million citizens have been brought into the democratic process. B. Drummond Ayres, Jr., *Law to Ease Voter Registration Has Added 5 Million to the Rolls*, N.Y. Times, Sept. 3, 1995, § 1 at 1.[8] While Petitioners protest that "[n]othing less is at stake than state autonomy," Pet. at 13, the more than forty states that have implemented the NVRA have done so with their sovereignty still intact. The most dramatic consequence of the NVRA has been its success in registering millions of new voters of varying backgrounds and political affiliations.[9]

SUMMARY OF ARGUMENT

The Court's discretionary review should not be invoked as this case fails to present "an important question" that "has not been . . . settled by this Court."

---

[8] A more recent survey, based on data collected from state election officials, estimates that eight million new voters have been registered nationwide. Human SERVE, *The National Voter Registration Act, January through September 1995*. In the first four months since it was ordered to implement the Act, California has seen 300,000 of its citizens registered through the NVRA. *300,000 Motor Voters*, San Francisco Chronicle, Dec. 9, 1995, at A21. Other states have also experienced unprecedented increases in registration. Florida has averaged over 135,000 registrations per month; Texas 80,000 per month; Georgia 60,000 per month; North Carolina 40,000 per month; and Missouri 30,000 per month. Amicus Curiae Human SERVE's Brief in Support of Plaintiffs-Appellees (filed with Ninth Circuit) at 3-4.

[9] *See* Frank Reeves & Peter J. Shelly, *Motor-Voter Law Helps GOP Most*, Pittsburgh Post-Gazette, Nov. 5, 1995, at A15; *The Motor Voter Act: Pleasant Surprises*, Phoenix Gazette, Sept. 9, 1995, at B8; William F. Zorzi, Jr., *Maryland GOP Benefiting from 'Motor Voter' Law*, Baltimore Sun, June 15, 1995, at 1B.

Supreme Court Rule 10(c). In fact, the decision below is supported by more than 100 years of precedent in this Court affirming beyond doubt Congress' authority over federal elections, including the registration of voters. Given this authority, there is simply no reasonable basis for questioning the NVRA's constitutionality.

Furthermore, no conflict exists among the courts of appeals on the issue presented. Every judge from every court to consider the question has concluded that the NVRA fits comfortably within Congress' constitutionally delegated powers. The Seventh and Ninth Circuits, as well as district courts in California, Illinois, Michigan, Kansas, South Carolina, Pennsylvania, and Virginia, are unanimous in concluding that Congress' power to enact the NVRA is authorized by the plain language of Article I, Section 4. As Chief Judge Posner stated in *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995), "the Constitution itself is clear enough to enable us to resolve the case."

Finally, because the Constitution gives Congress "the whip hand" with respect to the regulation of federal elections, *id.*, every court to consider the issue has easily dismissed any Tenth Amendment concerns. As Judge Sneed explained, in distinguishing the Tenth Amendment question raised in *New York v. United States*, 505 U.S. 144 (1992): "The flaw in the State of California's argument is that it ignores Article I, section 4, which, unlike the commerce power in Article I, section 8, empowers Congress to impose on the states precisely the burden at issue." *Voting Rights Coalition*, 60 F.3d at 1415. Therefore, the question whether Congress has imposed an "unfunded mandate" on the States is not of constitutional dimension. *Id.* Whatever the significance of this question as a political matter, it is addressed to the wrong branch of government and should not be decided by this Court.

ARGUMENT

A. IN ENACTING THE NVRA, CONGRESS ACTED SQUARELY WITHIN ITS POWER TO REGULATE FEDERAL ELECTIONS UNDER ARTICLE I, SECTION 4

1. Supreme Court precedent consistently upholds Congress' exercise of its supervisory power over federal elections under Article I, Section 4

The NVRA scarcely marks the first time that Congress has exercised its Article I, Section 4 authority to "make or alter" regulations concerning federal elections that impose burdens on the states. Nor did the rulings upholding the NVRA's constitutionality by the Ninth and Seventh Circuits, and the district courts in California, Illinois, Michigan, Kansas, South Carolina, Virginia, and Pennsylvania,[10] break any new constitutional ground. Indeed, this Court has repeatedly recognized for over a century, and as recently as this past Term, that the oversight power created by Article I, Section 4 confers broad and superior authority upon Congress to regulate the States' conduct of federal elections. *See, e.g., U.S. Term Limits, Inc. v. Thornton*, 514 U.S. ___, 115 S.Ct. 1842,

---

[10] *Wilson v. United States*, 878 F. Supp. 1324 (N.D.Cal. 1995); *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, 880 F. Supp. 1215 (N.D.Ill. 1995); *Association of Community Organizations for Reform Now (ACORN) v. Miller*, Nos. 4:95-CV-45, 1:95-CV-184, 1:95-CV-386 (W.D. Mich. Dec. 13, 1995); *League of Women Voters of Kansas v. Graves*, Case No. 95-2350-KHV (D. Kan. Nov. 30, 1995); *Condon v. Reno*, Civ. Action No. 3:95-192-0 (D.S.C. Nov. 21, 1995; amd. Dec. 12, 1995); *Commonwealth of Virginia v. United States*, Civ. Action No. 3:95CV357 (RLW) (E.D.Va. Oct. 18, 1995); *Association of Community Organizations for Reform Now (ACORN) v. Ridge*, Civ. Action Nos. 94-7671, 95-382 (E.D.Penn. Mar. 30, 1995).

1868-69, 1873, 1898 (1995) (majority, concurring and dissenting opinions); *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) ("Congress has ultimate supervisory power over congressional elections"); *United States v. Classic*, 313 U.S. 299, 315 (1941) (states are authorized to legislate "to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4"); *Ex Parte Siebold*, 100 U.S. (10 Otto) 371, 386 (1879) ("power of Congress over the subject is supervisory and paramount").

This question of Congress' authority in this area is simply not one about which there remains any serious dispute. As the *Siebold* Court stated in affirming Congress' "paramount" authority over the regulation of federal elections: "The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support." *Id.* at 393.

Although Congress has tended to leave the conduct of federal elections to the states, it has on a number of occasions specifically exercised its supervisory powers pursuant to Article I, Section 4. In 1842, for example, Congress passed several laws providing for the election of Representatives by separate districts, fixing the time of elections, and directing that elections be by ballot. *Id.* at 384. While these laws imposed duties on the States, Congress made no provision for reimbursement of the costs imposed. Congress again resorted to its Article I, Section 4 powers with the Enforcement Act of 1870, prescribing extensive regulations for the election of Representatives, including provisions for safeguarding voter registrations. 16 Stat. 140, 16 Stat. 254; *Siebold*, 100 U.S. at 399 (upholding constitutionality); *see also Ex Parte Clarke*, 100 U.S. (10 Otto) 399 (1879) (following *Siebold*).

In upholding the 1870 Act, the *Siebold* Court observed that "we are bound to assume that Congress . . . has endeavored to guard as far as possible against unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices." 100 U.S. at 393. Since *Siebold*, this Court has consistently affirmed the wide control available to Congress pursuant to its Article I, Section 4 powers. *See, e.g., United States v. Gradwell*, 243 U.S. 476, 485 (1917) (Congress may regulate federal elections by "positive and clear statutes"); *United States v. Mosley*, 238 U.S. 383 (1915) (upholding federal statute originally part of 1870 act upheld in *Siebold*). In *United States v. Classic*, 313 U.S. 299, 317 (1940), the Court held that Section 4 authorized Congress to regulate primary elections whenever "they are a step in the exercise by the people of their choice of representatives in Congress."

In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court considered the relationship between a Minnesota statute establishing new congressional districts and a federal statute prescribing conditions for congressional districts. When Congress exercises its Section 4 power, the *Smiley* Court stated, it "may supplement [ ] state regulations or may substitute its own." *Id.* at 366-367. Therefore, the Court held that while both states and the federal government possess "broad authority" to regulate federal elections, any such regulation by Congress "overrul[es]" similar state regulation. *Id.* at 367.

More recently, in *Oregon v. Mitchell*, this Court held that Congress could properly exercise its Article I, Section 4 powers to compel the States to lower the minimum voting age for federal elections from 21 to 18 and to prohibit States from using durational residency requirements to disqualify voters for presidential and vice-presidential elections. 400 U.S. 112, 117-18 (1970). Again, the

Court affirmed Congress' power to regulate federal elections by imposing duties on the States, to be implemented by state officers. At the same time, this Court also prescribed the limitations of Congress' Section 4 powers in holding that Congress cannot regulate state and local elections. *Id.* at 118.

When, only a few months ago, this Court reviewed the allocation of authority between Congress and the States as to the regulation of federal elections pursuant to Article I, Section 4, it reached the same conclusion that it always has. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. ___, 115 S.Ct. 1842 (1995). Every member of this Court reasserted there that it is Congress, **not** the States, that has the ultimate authority to "make or alter" all such regulations. *Id.*, 115 S.Ct. at 1857-58 (majority), 1873 (Kennedy, J., concurring), 1883-84 (Thomas, J., dissenting). The majority recognized once more that Article I, Section 4 gives Congress the last word on all matters relating to the conduct of federal elections. *Id.* at 1869 (quoting *Smiley v. Holm*, 285 U.S. at 366-67 ("[T]he Congress may supplement these state regulations or may substitute its own")). As further explained by Justice Kennedy in his concurring opinion:

> The political identity of the entire people of the Union is reinforced by the proposition which I take to be beyond dispute, that, though limited as to its objects, the National Government is and must be controlled by the people without collateral interference by the States.

Id. at 1873.

The dissenting opinion by Justice Thomas similarly stressed that Article I, Section 4 "giv[es] Congress the power to **override** state regulations of '[t]he Times, Places and Manner of holding [congressional] Elections.' " *Id.* at 1898 (emphasis and first bracket added). According to Justice Thomas, Article I, Section 4 "does not delegate

any authority to the States," but "simply imposes a duty upon them." *Id.* at 1883. In explaining the reasons why Congress was given authority over the States in this area, Justice Thomas observed:

> The Framers did trust Congress more than the States when it came to preserving the Federal Government's own existence; to advance this interest, they had to give Congress the capacity to prescribe both the date and the mechanics of congressional elections.

Id. at 1898.

In sum, Congress' supervisory authority over the States in the area of federal elections is set forth in the Constitution and has been expressly reaffirmed each time this Court has had occasion to comment upon it. *See, e.g., Mitchell,* 400 U.S. at 124-25 ("ultimate supervisory power" and "final authority" over federal elections); *Gradwell,* 243 U.S. at 482 (extent of Section 4 power "has been settled by repeated decisions of this court"); *Smiley,* 285 U.S. at 367 ("broad authority"); *Siebold,* 100 U.S. at 386 (Congress' power "supervisory and paramount"). While Congress traditionally has chosen to defer to the states, *see Gradwell,* 243 U.S. at 485 (policy for great part of "our constitutional life" to leave conduct of elections to state); *Siebold,* 100 U.S. at 388 (Congress "has been content to leave them as prescribed by state laws"), its ability to exercise its Section 4 powers remains, without condition or qualification.

> Section 4 states without qualification that the state legislatures shall prescribe regulations for the conduct of elections for Representatives and, **equally without qualification,** that Congress may make or alter such regulations. **There is nothing to indicate any limitation whatsoever** on this grant of plenary initial and supervisory power.

Wesberry v. Sanders, 376 U.S. 1, 29-30 (1964) (Harlan, J., dissenting) (emphasis added).[11]

2. The plain language of Article I, Section 4 expressly authorizes Congress' enactment of the NVRA.

The unbroken line of Supreme Court authority reviewed above is firmly supported by the plain language of Article I, Section 4:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. Art. I, § 4.

Focusing closely on this text, the Court has stated that Congress could certainly enact a "complete code" of federal elections if it wanted to, including detailed provisions for voter registration:

---

[11] In many of the cases cited above, the Supreme Court held that the breadth of Congress' authority to regulate federal elections extended even to penal provisions designed to protect the integrity of the federal electoral process. *See, e.g., United States v. Classic*, 313 U.S. at 320 (two criminal code provisions were regulations of "manner of holding elections"); *United States v. Mosley*, 238 U.S. 383, 385-86 (1915) (upholding statute making it an offense to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution"); *Ex Parte Yarbrough*, 110 U.S. 651, 654-55 (1883) (upholding constitutionality of federal criminal statute banning use of force, intimidation or threats to prevent eligible voter from supporting a candidate for federal office); *Siebold*, 100 U.S. at 381-82 (listing criminal provisions of Enforcement Act).

> It cannot be doubted that **these comprehensive words embrace authority to provide a complete code for congressional elections**, not only as to times and places, but in relation to notices, **registration**, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. at 366 (emphases added); *see also United States v. Gradwell*, 243 U.S. at 483 ("process of the elections of Congressmen [includes] the registration of voters to the final certifying of the results, and . . . the control thus established over such elections was comprehensive and complete").

As Justice Black observed in *Oregon v. Mitchell*: "Any doubt about the powers of Congress to regulate congressional elections . . . should be dispelled by the opinion of this Court in *Smiley v. Holm*." 400 U.S. at 122. The specific clause allowing Congress to "at any time by Law make or alter such Regulations," authorizes Congress to do anything the state legislatures could do and grants Congress "a general supervisory power over the whole subject." *Smiley*, 285 U.S. at 367 (quoting *Siebold*, 100 U.S. at 387); *see also Mitchell*, 400 U.S. at 123 ("Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them"). That Congress may not only "make" but may also "alter" regulations underscores its power to impose duties on the States. The system for conducting federal elections is to be constructed, in the first instance, by the States. Yet the Constitution's text clearly contemplates congressional

modification of the States' systems, hence control over their officers.

On the single subject over which the Framers intended to limit congressional authority – over the "Place of chusing Senators" – they did so expressly. The conspicuous absence of any other qualification leaves no doubt as to Article I, Section 4's broad scope. Any other construction, such as that promoted by Petitioners, would make nonsensical the plain meaning of the words "make" and "alter."

It should therefore come as no surprise that every federal judge who has considered the issue of the NVRA's constitutionality – panels of the Seventh and Ninth Circuits, and district courts in California, Illinois, Michigan, Kansas, South Carolina, Virginia, and Pennsylvania[12] – has reached the same conclusion. Each has rejected out of hand the precise claims offered here by Petitioners and has upheld the NVRA.

The opinion by Chief Judge Posner for the Seventh Circuit leaves no doubt that, under the plain language of Article I, Section 4, Congress has the power to direct the States to hold federal elections as it dictates:

---

[12] The Seventh Circuit panel consisted of Judges Posner, Easterbrook and Kanne, *ACORN v. Edgar*, 56 F.3d 791, and the district judge in Illinois was Judge Shadur. 880 F. Supp. 1215. The Ninth Circuit panel consisted of Judges Sneed, Kleinfeld and Goodwin, *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, and the district judge in California was Judge Ware. 878 F. Supp. 1324. The district judge in Michigan was Judge Hillman, *ACORN v. Miller*, Nos. 4:95-CV-45, 1:95-CV-184, 1:95-CV-386; in Kansas, Judge Vratil, *League of Women Voters v. Graves*, Case No. 93-2350-KHV; in South Carolina, Judge Perry, *Condon v. Reno*, Civ. Action No. 3:95-192-0; in Virginia, Judge Williams, *Commonwealth of Virginia v. United States*, Civ. Action No. 3:95CV357 (RLW); and in Pennsylvania, Judge Buckwalter. *ACORN v. Ridge*, Civ. Action Nos. 94-7671 & 95-382.

> As emphasized in *New York v. United States*, on which the State of Illinois relies so heavily, the provisions of the Constitution that relate to the states mostly tell them not what they must do but what they can or cannot do. Article I section 4 (not discussed in *New York v. United States*) is an exception. The first sentence tells the states that they, not Congress, must regulate the times, places, and manner of holding federal elections, implicitly at their own expense. A state cannot say to Congress, "We are not interested in elections for federal office. If you want to conduct such elections in our state you must do so yourself – establish your own system of registration, hire your own registrars, find your own places for voting." The state is obligated to do these things. *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, ___, 115 S.Ct. 1842, 1845-55, 131 L.Ed.2d 881 (1995). The power conferred as a corollary to the imposition of this duty could be abused, so Article I section 4 goes on to provide that Congress can if it wants step in and either make its own regulations or alter those adopted by the state pursuant to the duty imposed by the first sentence. *Id.* at ___, 115 S.Ct. at 1857-59. Even when there is no abuse, as we have seen, Congress can, as in the law fixing a uniform date for federal elections, regulate federal elections and force the state to bear the expense of the regulation.

ACORN v. Edgar, 56 F.3d at 794 (emphasis in original).

Judge Posner also easily dispensed with the claim that the NVRA lies outside the bounds of Article I, Section 4 because it requires state officers to assist in voter registration:

> [T]he state itself concedes, as it must in light of the holding of *Ex parte Siebold*, that . . . Congress could have established a separate system of

> voter registration for federal elections, manned by federal officers, having all the burdensome features of which Illinois complains. If Congress had done that, however, the burden would fall on the federal fisc alone. That is why the state is happy to make the concession. But Article I section 4 does not authorize Congress only to establish a system of federal voter registration. The first sentence, remember, requires the states to create and operate such a system and the second authorizes Congress to alter the state's system – but it is still the state's system, manned by state officers and hence paid for by the state.

Id. at 795. In view of the plain language of Article I, Section 4, Judge Posner had no trouble concluding that "the Constitution itself is clear enough to enable us to resolve the case." *Id.* at 793.

The Ninth Circuit's opinion, written by Judge Sneed, is in full accord with each of these points. Following the Seventh Circuit, the Ninth Circuit soundly rejected the argument that Congress had exceeded its authority in enacting legislation designed to eliminate obstacles to voter registration. Characterizing the power given to Congress by Article I, Section 4 as "quite broad," Judge Sneed found that the NVRA "fits comfortably within its grasp." *Voting Rights Coalition*, 60 F.3d at 1413-14.

3. The legislative history of Article I, Section 4 permits regulations by both federal and state governments, but makes any federal regulation paramount

The legislative history of Article I, Section 4 provides additional support for this Court's consistent holdings that Congress has been constitutionally afforded the final say in the regulation of federal elections. In fact, Article I, Section 4 was the subject of intense debate at the various

state ratifying conventions of 1787-1789. At that time, elections within the meaning of Section 4 were "those wherein Senators should be chosen by legislatures and Representatives by voters possessing 'the qualifications requisite for electors of the most numerous branch of the state legislature.' " *Newberry v. United States*, 256 U.S. at 249-50 (1920) (quoting U.S. Const. Art I, §§ 2, 3). Thus, many states feared that granting Congress the power to regulate the times, places, and manner of electing Congressmen "might be extended to and embrace the regulation of the election of the members of the state legislatures who were to exercise the power to elect Senators." *Id.* at 268.

On the other hand, proponents of the provision believed that consigning the power to regulate federal elections exclusively with the States would place the existence of the federal government entirely at the mercy of the States. "They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs." *The Federalist No. 59*, at 363 (Alexander Hamilton) (Clinton Rossiter, ed. 1961); *see also The Federalist No. 60*, at 366 (Hamilton) ("an uncontrollable power over the elections to the federal government could not, without hazard, be committed to the State legislatures").

In the end, granting Congress paramount power over federal elections was considered indispensable, and those favoring congressional authority over federal elections prevailed. *See* J. Story, *Commentaries on the Constitution of the United States* 280-292 (1st ed. 1833) (cited in *Oregon v. Mitchell*, 400 U.S. at 119 n.2). Alexander Hamilton explained that Section 4's "propriety rests upon the evidence of this plain proposition, that **every government ought to contain in itself the means of its own preservation.**" *The Federalist No. 59*, at 362 (emphasis in original).

As evident from his remarks at the Virginia Convention, James Madison held the same view:

> It was found impossible to fix the time, place, and manner of election of representatives in the constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments as being best acquainted with the situation of the people, subject to the control of the general government, **in order to enable it to produce uniformity and prevent its own dissolution**. . . . Were they exclusively under the control of the state governments, the general government might easily be dissolved. . . . The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution.

Records of the Federal Convention, vol. 3, at 311 (Farrand) (quoted in *Gradwell*, 243 U.S. at 484) (emphasis added).[13]

The fears of the provision's opponents were dispelled by restricting congressional authority to the **times**, **places**, and **manner** of elections, and by not giving Congress any authority to deal with the election of the state legislatures, which was a power reserved to the states. *The Federalist No. 60*, at 371 (Hamilton); *Newberry*, 256 U.S.

---

[13] Delegates to the Massachusetts Convention also recognized the inherent danger of granting exclusive control to the states. For example, Mr. Cabot warned that "if the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may . . . finally annihilate that control of the general government, which the people ought always to have." Story, *Commentaries* 26 (quoted in *Oregon v. Mitchell*, 400 U.S. 112, 119 n.2 (1970)). Similarly, Mr. Parsons stated that only by giving the federal government "controlling power" over federal elections could the people's "equal and sacred rights of election" be preserved. *Id.* at 27.

at 269 (White, J., dissenting). Thus, in order to safeguard the continued existence of the federal government and to effectuate uniformity throughout the nation as needed, the Framers quite deliberately placed ultimate control over federal elections in the hands of the federal government. This Court has never permitted any other result.

B. IN VIEW OF THE UNBROKEN LINE OF CASES ESTABLISHING CONGRESS' AUTHORITY OVER FEDERAL ELECTIONS, THIS CASE PRESENTS NO SUBSTANTIAL TENTH AMENDMENT QUESTION

Petitioners also seek review to assert their claim that the NVRA is unconstitutional under the Tenth Amendment. But given that this Court has so clearly and frequently construed Article I, Section 4 to accord Congress paramount authority over the regulation of federal elections, there is nothing "reserved" to the states so as to raise a Tenth Amendment question. Any other result would constitute a radical departure from over a century of settled Tenth Amendment jurisprudence, both as to holdings and methodology of adjudication.

Application of the Tenth Amendment is to be determined by "inquir[ing] whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution." *New York v. United States*, 505 U.S. 144, 155 (1992) (citing *Perez v. United States*, 402 U.S. 146 (1971) and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . . " *New York v. United States*, 505 U.S. at 156.

Because the NVRA was enacted pursuant to a constitutional provision that explicitly grants Congress the

power to regulate the states, it cannot offend the constitutionally-mandated division of authority between the states and the federal government. To assert otherwise, as Petitioners necessarily have been compelled to argue to this Court, would render Article I, Section 4 nugatory: Congress, in fact, would **not** have the power at all to "make or alter" the States' regulations. Instead, State executives and legislatures would command ultimate authority to dictate how federal elections are conducted and basic tenets of federalism would be flipped on their head.

By their very role in our democratic scheme, **federal** elections, the existence of which are dependent upon the Constitution, could never have been within the "reserved" powers of the States. The Tenth Amendment simply provides that "powers not delegated to the United States by the Constitution . . . are reserved to the States." Thus, this Court in *Mitchell* held that Congress could not regulate state elections because the "Constitution reserves to the States the power to set voter qualifications in state and local elections." *Mitchell*, 400 U.S. at 125. Yet, as this Court recently observed, "No state can say, that it has reserved, what it never possessed." *U.S. Term Limits, Inc.*, 115 S.Ct. at 1854 (quoting Justice Story).

Because the ultimate authority to regulate federal elections was "never possessed" by the states, the Tenth Amendment is simply irrelevant here:

> For the election of Senators and Representatives in Congress is a Federal function; whatever the states do in the matter they do under authority derived from the Constitution of the United States. The reservation contained in the 10th Amendment cannot properly operate upon this subject in favor of the state governments; they

> could not reserve power over a matter that had no previous existence.

Newberry, 256 U.S. at 281 (White, J., dissenting).

For these reasons, all of the lower courts examining the NVRA have concluded that the holding of *New York v. United States* has no relevance to the question of the NVRA's constitutionality. While under the Commerce Clause, Congress may regulate private activity that affects interstate commerce, its ability to regulate "States as States" is very closely circumscribed. *Garcia v. San Antonio Met. Transit Auth.*, 469 U.S. 528, 554 (1985); *EEOC v. Wyoming*, 460 U.S. 226, 237 (1983); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981).

A simple comparison of the text of the Commerce Clause with that of Article I, Section 4 easily illustrates the substantively different ranges of authority conferred. The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. Art. I, § 8, cl. 3. It is completely silent on the issue of congressional regulation of States. In contrast, Section 4 directly confronts the issue, stating that: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, **shall be prescribed in each State by the Legislature** thereof; **but the Congress may at any time by Law make or alter such Regulations**. . . . " U.S. Const. Art. I, § 4, cl. 1 (emphases added).[14] This provision clearly and specifically

---

[14] Rarely does our federalist system "require[ ] or give[ ] room for conjoint action between the state and national sovereignties." *Siebold*, 100 U.S. at 392. For the most part, the operations of the federal government are to be "conducted separately" from those of the states. *Id.* With respect to those "very few subjects," *id.*, other than Article I, Section 4, where the Constitution contemplates joint action and gives Congress the final say, it does so in explicit terms:

authorizes Congress to regulate the states in the administration and conduct of federal elections. It leaves room for state participation, but not for state domination. *See, e.g., Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (discussing Fugitives clause: "Because the duty is directly imposed upon the States by the Constitution itself, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment.").

Petitioners' attempt to rely on *United States v. Lopez*, 514 U.S. ___, 131 L.Ed.2d 626 (1995), is likewise misplaced. *Lopez*, which holds that Congress exceeded its authority under the Commerce Clause in enacting the Gun-Free School Zones Act, crystallizes the fatal flaw in the State's argument. As stated in the *Lopez* passage quoted in the Petition for Certiorari, "in areas such as

---

Article I, Section 8, clause 16: "To provide for organizing, arming, and disciplining, the Militia, . . . **reserving to the States respectively**, the Appointment of the Officers, and the Authority of training the Militia **according to the discipline prescribed by Congress**."

Article I, Section 10, clause 2: "**No State shall, without the Consent of the Congress**, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and **all such Laws shall be subject to the Revision and Controul of the Congress**."

Article II, Section 1, clause 4: "**Congress may determine** the Time of chusing the [States'] Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

criminal law enforcement or education . . . States historically have been sovereign." *Id.* at 641 (quoted in Pet. at 25). The regulation of federal elections is manifestly different. Indeed, if there is any area in which the States historically have **not** been sovereign, it is in the regulation of federal elections. Over this subject, as Chief Judge Posner stated in *ACORN*, "Congress was given the whip hand." 56 F.3d at 794. The Constitution confers upon Congress not only the power to regulate federal elections, but also the authority to "force the state to bear the expense of the regulation." *Id.*; *see also Voting Rights Coalition*, 60 F.3d at 1415. *Lopez*'s emphasis on the states' historical authority to regulate education thus magnifies the defect in the State's attempt to apply Commerce Clause reasoning in the territory governed by Article I, Section 4.

Although Petitioners attempt to make much of the fact that the NVRA involves state officers whose traditional responsibilities are unrelated to elections, this fact is of no constitutional import – particularly since the officers involved already perform functions comparable to those required by the NVRA. "In no matter should [courts] pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 603 (1949) (opinion of Jackson, J.). As Chief Justice Marshall stated with regard to Congress' power under the "necessary and proper" clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means by which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Nor does the NVRA represent the first time that Congress has imposed duties on state officers other than election officials. Congress previously has exercised its Section 4 powers in very specific terms, for example, to tell state **legislatures** "to meet in joint convention, and

fixing the day when this should be done, and requiring them so to meet on every day thereafter and vote for a senator until one was elected." *Ex Parte Yarbrough*, 110 U.S. 651, 661 (1884). The NVRA, which contemplates the participation of state officers who already perform the ministerial duty of compiling lists, imposes a much less onerous burden on the States.

Petitioners' effort to characterize the lack of full federal funding or reliance upon state officials to carry out some of the requirements of the NVRA is equally insubstantial as a Tenth Amendment issue. There is, of course, nothing new about the use of state resources and personnel to run federal elections. *Voting Rights Coalition*, 60 F.3d at 1415 (exercise of Congress' Section 4 power "intended to be borne by the states without compensation" and no authorities "have suggested, even remotely, the necessity of the United States bearing the burden of any alteration it imposed."). Proper funding for any program is surely a meaningful practical consideration in implementation. But while the federal government does in fact assume a portion of the costs involved in implementing the NVRA, and Petitioners' assertions as to California's costs and burdens are much exaggerated, which entities should bear the expenses of a program enacted pursuant to congressional authority is a legislative policy decision, not a matter of constitutional dimension for the courts. *See Garcia*, 469 U.S. at 555 n.21 (presence or absence of federal funding not a Tenth Amendment issue); *Hodel*, 452 U.S. at 292 n.33 (statute's impact on state economy "insufficient to establish a violation of the Tenth Amendment").[15]

---

[15] As explained in the Statement of Facts, *supra*, we thoroughly disagree with the State's estimate of the burdens associated with the NVRA and with its arguments as to their relevance. In any event, these subjects are inappropriate for

Accordingly, the Seventh Circuit found no merit whatsoever in the state's attempt to "grope[ ] for some extratextual limitation on the power granted by Article I section 4" by invoking the Tenth Amendment:

> Illinois advances the related notion that to make a state administer federal elections fatally compromises state sovereignty. That particular "fatal compromise," however, is built into the Constitution, precisely in Article I section 4, the first sentence of which places the burden of administering federal elections on the states.

ACORN, 56 F.3d at 796. While Congress may, if it wishes, reimburse the states for the costs of conducting federal elections, there is no constitutional requirement that it do so.

Because the Constitution has already struck the proper balance between federal and state interests in this area, further balancing is unnecessary. When drafting the Constitution, the Framers evaluated the merits of granting authority over federal elections exclusively to the states or exclusively to the federal government. In the end, they created a federalist system that conferred plenary authority upon both, but gave Congress ultimate supervisory power. It was " 'not a controversy between equals.' " *United States v. Manning*, 215 F. Supp. 272, 277 (W.D. La. 1963) (quoting Justice Holmes). Thus, "[t]here is no such conflict between them as to prevent their forming

---

resolution through a facial challenge. As both the Seventh Circuit and the Ninth Circuit expressly stated in their opinions, implementation of the NVRA should be accomplished with an "adequate sensitivity to the principle of federalism." *Voting Rights Coalition*, 60 F.3d at 1416; *ACORN*, 56 F.3d at 798. If the implementation of the NVRA violates this principle, an as-applied challenge would of course be the appropriate means by which to raise such a claim. The burdens imposed on the state, even if relevant, simply cannot be considered given the present posture of this case.

a harmonious system perfectly capable of being administered and carried out as such." *Siebold*, 100 U.S. at 386. In the face of such emphatic and unambiguous precedent, there exist no suitable grounds for review by this Court.

CONCLUSION

Questions relating to the scope of congressional power often implicate novel and important constitutional issues that should be addressed. This case does not present such an issue. This case involves a clear constitutional mandate that has been consistently affirmed by this Court. Time and time again, when asked to consider Article I, Section 4, this Court has reiterated Congress' "paramount" authority to regulate federal elections, a power that includes the registration of voters. There is no reason for this Court to say again what it already has said clearly and forcefully. Accordingly, the Court should deny the State's Petition.

Dated: December 26, 1995

Respectfully submitted,

ROBERT RUBIN
Counsel of Record
Lawyers' Committee for
Civil Rights of the
San Francisco Bay Area
301 Mission Street, Suite 400
San Francisco, CA 94105
(415) 543-9444

MARK D. ROSENBAUM
ACLU of Southern California
1616 Beverly Blvd.
Los Angeles, CA 90026
(213) 977-9500

(5)

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-673

In the

Supreme Court of the United States

October Term, 1995

PETE WILSON, Governor of California, *et al.*,
Petitioners,

v.

VOTING RIGHTS COALITION, *et al.*,
Respondents.

PETE WILSON, Governor of California, *et al.*,
Petitioners,

v.

JANET RENO, U.S. Attorney General, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND THE STATES OF ARIZONA, IDAHO, NEW HAMPSHIRE, AND SOUTH CAROLINA IN SUPPORT OF PETITIONERS

ALAN G. LANCE
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400

*ANTHONY T. CASO
*Counsel of Record
ANNE M. HAWKINS
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, CA 95833
Telephone: (916) 641-8888

Attorneys for Amici Curiae
Additional Counsel Continued Inside Cover

36 pp

GRANT WOODS
Arizona Attorney General
1275 West Washington
Phoenix, AZ 85007

CHARLES MOLONY CONDON
Attorney General for the State
of South Carolina
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3970

JEFFREY R. HOWARD
Attorney General for the
State of New Hampshire
33 Capitol Street
Concord, NH 03301
Telephone: (603) 271-3658

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI 5

I. THIS COURT SHOULD ESTABLISH THAT CONGRESS LACKS THE POWER TO REQUIRE STATE AGENCIES TO CARRY OUT FEDERAL REGULATORY PROGRAMS 5

II. THIS COURT SHOULD CLARIFY THE SCOPE OF CONGRESS' ARTICLE I, SECTION 4, ELECTIONS POWER 9

III. THIS COURT SHOULD FURTHER DEFINE THE DIVISION BETWEEN STATE AND FEDERAL SOVEREIGNTY CLEARLY EMBODIED IN THE TENTH AMENDMENT 14

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

CASES

Addison v. Department of Motor Vehicles, 69 Cal. App. 3d 486 (1977) 8

Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791 (7th Cir. 1995) 10

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 3,18-19

Gregory v. Ashcroft, 501 U.S. 452, 115 L. Ed. 2d 410 (1991) 17

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 2

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 13-14

Kugler v. Yocum, 69 Cal. 2d 371 (1968) 8

Morris v. Williams, 67 Cal. 3d 733 (1967) 7-8

New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120 (1992) 11,15-16,18-19

Smiley v. Holm, 285 U.S. 355 (1932) 10,12

U.S. Term Limits, Inc. v. Thornton, 514 U.S. ___, 131 L. Ed. 2d 881 (1995) 11-12

Page

Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995) 10,13-15,17

STATUTES

Cal. Elections Code § 500 5

§ 507 5

§ 510 5

Cal. Government Code § 11501 9

Cal. Vehicle Code § 1500 7

42 U.S.C. §§ 1973gg-1973gg-10 5

§ 1973gg-3 5,8

§ 1973gg-3(a)(1) 5

§ 1973gg-3(c)(2)(A) 5

§ 1973gg-3(c)(2)(B) 6

§ 1973gg-3(c)(2)(C) 6

§ 1973gg-3(c)(2)(D) 7

§ 1973gg-3(d) 6

§ 1973gg-3(e) 6

§ 1973gg-4 6

§ 1973gg-4(a) 6

Page

§ 1973gg-5(a)(2) 6

§ 1973gg-5(a)(3) 6

§ 1973gg-5(a)(6)(A) 6

§ 1973gg-5(a)(6)(B) 7

§ 1973gg-6(d) 7

§ 1973gg-9 8

§ 1973gg-9(a) 8

§ 1973gg-9(b)(1) 8

§ 1973gg-9(b)(2) 8

§ 1973gg-10 8

UNITED STATES CONSTITUTION

Article I, Section 4 . . . . . passim

Tenth Amendment . . . . . passim

MISCELLANEOUS

The Federalist No. 59, at 299 (Alexander Hamilton) (G. Wills ed.) 11

No. 95-673

In the

Supreme Court of the United States

October Term, 1995

PETE WILSON, Governor of California, *et al.*,
Petitioners,

v.

VOTING RIGHTS COALITION, *et al.*,
Respondents.

PETE WILSON, Governor of California, *et al.*,
Petitioners,

v.

JANET RENO, U.S. Attorney General, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND THE STATES OF ARIZONA, IDAHO, NEW HAMPSHIRE, AND SOUTH CAROLINA IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for

PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning the Tenth Amendment and limitations upon Congress' Article I powers. For example, PLF participated as amicus curiae before this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience dealing with state sovereignty issues will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.2, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

Amici, the States of Arizona and Idaho are not involved in litigation related to the National Voting Rights Act of 1993. However, as two of the 50 sovereign states, they have a vital interest in having this Court resolve the significant state and federal sovereignty issues raised by this appeal.

Amicus, the State of New Hampshire, is in a position to be affected directly by the outcome of this litigation. New Hampshire has been named a defendant in an action brought by private litigants for its alleged noncompliance with the National Voting Rights Act of 1993 despite its having adopted an effective, less cumbersome and costly system of election day registration. *League of Women Voters of New Hampshire v. Merrill*, Civ. No. 95-232-M (D.N.H. filed May 2, 1995). New Hampshire is defending this District Court action on grounds which include that the National

Voting Rights Act violates the division between state and federal sovereignty embodied in the Tenth Amendment to the United States Constitution and that it exceeds Congress' Article I, Section 4, elections power.

Amicus, the State of South Carolina, stands to be affected directly by the outcome of this litigation. South Carolina has challenged the constitutionality of the National Voting Rights Act of 1993 in *Condon v. Reno*, Civ. No. 3:95-1992-0 (D.S.C. filed Jan. 24, 1995). The District Court recently ruled against South Carolina in that case, and South Carolina has appealed to the Court of Appeals for the Fourth Circuit, but it is unlikely that the Fourth Circuit will rule before the present petition is decided upon.

STATEMENT OF THE CASE

Amicus adopts herein petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

> The true "essence" of federalism is that the States *as* States have legitimate interests which the national government is bound to respect even though its laws are supreme. If federalism so conceived and so carefully cultivated is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (citation omitted; emphasis in original). This case squarely presents the question of whether the federal government may,

consistent with federalism principles, conscript state officials and order them to spend state funds in a manner different from that directed by their sovereign state governments.

The Ninth Circuit upheld the National Voting Rights Act of 1993 (NVRA) against a Tenth Amendment challenge by Governor Wilson of California. The court found that federalism principles do not prevent Congress from forcing state agencies to engage in activities outside the scope of state legislation. It further found that the Times, Places and Manner power enumerated in Article I, Section 4, of the Constitution gives Congress the power to interfere in the internal administration of state government for the purpose of regulating federal elections, and that Tenth Amendment considerations relevant to Congress' commerce powers do not apply in the context of Congress' election powers.

The brief opinion does not adequately address the sovereignty considerations raised by Governor Wilson, instead finding in Article I, Section 4, the equivalent of a "plain statement" that the Framers intended the federal government to interfere in state government where that interference is related to federal elections. Such a cursory analysis disserves the Constitution and the careful thought and debate that crafted the balance of power between the federal government and the states in that document.

Resolution of this issue by this Court is of vital interest to the states. California is not alone among the states in its legal challenge to NVRA. To date, amicus is aware that Illinois, Michigan, Mississippi, New Hampshire, Pennsylvania, South Carolina, and Virginia are currently or have been involved in litigation related to provisions of NVRA. At least four of these states have mounted facial challenges to the act. This Court should reinforce the principle that states are *independent* sovereigns, and that no federal power, however supreme, can divest them of this attribute.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THIS COURT SHOULD ESTABLISH THAT CONGRESS LACKS THE POWER TO REQUIRE STATE AGENCIES TO CARRY OUT FEDERAL REGULATORY PROGRAMS

Voter registration in California is exceedingly simple. One need only fill out a postcard attesting to one's right to vote (Cal. Elec. Code § 500). A fixed address is unnecessary, and postcards are freely available to anyone who requests one from the county registrar of voters (Section 507). Affixing postage to the preaddressed cards is unnecessary (Section 510). During election cycles, Californians cannot go to a supermarket or shopping mall without being accosted by privately paid individuals or volunteers who see it as their duty to register every shopper. Apparently dissatisfied that portions of the electorate have neglected to exert this minimal amount of effort, Congress concluded that voters should be registered despite their passivity, and enacted the National Voting Rights Act of 1993 (42 U.S.C. §§ 1973gg to 1973gg-10).

NVRA requires that state motor vehicle licensing agencies serve as voter registration agencies (42 U.S.C. § 1973gg-3). States are required to modify driver's license applications to serve the dual purpose of voter registration (Section 1973gg-3(a)(1)). The voter registration portion of the form may not duplicate information requested for the driver's application portion (Section 1973gg-3(c)(2)(A)), and it may not require more information than that needed to prevent duplicate registration or to assess the applicant's

eligibility to vote (Section 1973gg-3(c)(2)(B)); further, the form must list voter eligibility requirements, and a signed attestation by the applicant that he or she meets such requirements (Section 1973gg-3(c)(2)(C)). A change of address for a driver's license must also serve as a change of address for voter registration (Section 1973gg-3(d)). The motor vehicle licensing agency must transmit the voter registration application to the state election official within ten days, or, in some cases, five days (Section 1973gg-3(e)).

NVRA also requires that states designate other state offices to serve as voter registration agencies, including all offices that provide public assistance and that administer state-funded programs providing services to persons with disabilities (Section 1973gg-5(a)(2)). States must also designate additional state agencies of the state's own choosing to serve in this capacity and may also designate federal and nongovernmental offices upon their agreement (Section 1973gg-5(a)(3)). Not only must all of these agencies have at their disposal mail-in registration forms, employees at *all* of these agencies must distribute voter registration applications with each application for the services which the office normally provides, as well as offer assistance to applicants in completing voter registration forms (Section 1973gg-5(a)(6)(A)). All voter registration applications must be transmitted to the state election official within ten days, or, in some cases, five days.

Finally, NVRA allows mail-in registration to continue (Section 1973gg-4). However, even here, the federal government is not content with existing state processes. Rather, "States shall accept and use the mail voter registration application prescribed by the Federal Election Commission." *Id.* Alternatively, states may use their own form--so long as that form meets federal criteria as delineated in the act (Section 1973gg-4(a)).

State employees must keep voter registration records confidential and not use such records for purposes other than voter registration (Sections 1973gg-3(c)(2)(D) and 1973gg-5(a)(6)(B)). States are given limited means by which they can purge voter registration records (Section 1973gg-6(d)).

Naturally, NVRA makes it clear that this painstakingly detailed voter registration process applies only to *federal* elections, since Congress is admirably sensitive to the fact that it may not prescribe procedures for state elections. This presumes that, after going to the time, trouble, and expense of complying with NVRA, states would deem it prudent to prescribe a separate procedure for their own state elections.

All executive agencies in California, including the motor vehicle licensing agency and the welfare agency, were created by acts of the Legislature. The statutes creating these agencies and defining their powers and duties appear in the California codes. For example, in California, the motor vehicle licensing agency is the Department of Motor Vehicles (DMV), created by statute in 1959 (California Vehicle Code § 1500). Since DMV was created, the Legislature has amended and adopted numerous provisions relating to the functioning of that agency, but at no time has the California State Legislature delegated to DMV the authority to register voters.

California courts have faithfully adhered to the principle that administrative agencies are creatures of the Legislature that created them. The California Supreme Court, in *Morris v. Williams*, clearly enunciated the applicable rule:

> [W]e here discharge our responsibility to determine whether the Agency has acted in obedience to the mandate of the Legislature or has ignored or violated it. ... [Regulations] must

> conform to the legislative will if we are to preserve an orderly system of government.

Morris v. Williams, 67 Cal. 3d 733, 737 (1967). The California courts' adherence to the rules governing administrative agencies are not mere paeans to administrative form, but inhere in separation of powers principles: an executive agency may only exercise those powers that the *legislative branch delegates to them. See*, e.g., *Kugler v. Yocum*, 69 Cal. 2d 371, 375-76 (1968). Incidentally, California courts have specifically noted this limitation upon the DMV. *Addison v. Department of Motor Vehicles*, 69 Cal. App. 3d 486, 493 (1977).

Given the framework which the California State Legislature has erected over a period of many years to insure that these agencies operate within the guidelines established by the Legislature, it is clear that, had these agencies themselves attempted to promulgate the rules set out under Section 1973gg-3 of NVRA, the regulations would be held, under California law, void and of no effect.

If NVRA is to be given full force and effect, its practical effect is to act as "super"-enabling legislation, a delegation of federal duties under federal law directly to state executive agencies. Compliance with NVRA requires these agencies to administer a federal program entirely alien to the duties delegated to them by the state Legislature that created them.

In addition, NVRA provides for civil and criminal enforcement of its provisions (Sections 1973gg-9 and 1973gg-10). Under the civil right of action, both the United States Attorney General and private parties "aggrieved by a violation of this subchapter" "may bring a civil action in an appropriate district court for declaratory or injunctive relief" (Section 1973gg-9(a) and (b)(1) and (2)). This provision anticipates that state agencies, such as DMV, may be hailed

into federal court for violations of NVRA, a forum to which state agencies generally have never had to answer for their actions in the absence of questions of constitutional stature. The California Government Code, in fact, provides that actions of DMV (as well as the Department of Social Services and other agencies that may be called upon to meet the dictates of NVRA (Cal. Gov't Code § 11501)) are subject to state administrative adjudicatory procedures. Not so under NVRA. NVRA raises the prospect that state agencies will not merely have to submit to federal legislative power, but may be subjected to the entire panoply of federal power as exercised through its executive and judicial branches.

This intrusion by the federal government into the inner workings of state administrative bodies is unprecedented. The impact caused by NVRA is not merely or even primarily its drain on the state fisc. It is an imposition upon the citizens of the State of California who will be forced to wait in slower and longer lines at DMV, the welfare office, and other state agencies, to obtain the services which their elected state representatives have labored to provide. This Court should resolve whether any Article I power of Congress includes the power to force state executive agencies to take actions that are outside the scope of the state legislation that governs them and to expend for these federal purposes funds appropriated by the state Legislature for other state purposes.

II
THIS COURT SHOULD CLARIFY THE SCOPE OF CONGRESS' ARTICLE I, SECTION 4, ELECTIONS POWER

Article I, Section 4, of the United States Constitution reads:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

> thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This Court has interpreted Section 4 broadly, stating that it grants Congress the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, *registration*, supervision of voters, prevention of fraud, [etc.]." *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (emphasis added). The Ninth Circuit in this case expands Congress' election powers further still, and in a manner that distinguishes it from previous exercises upheld by this Court. Because "no previous federal election laws are sufficiently analogous to [NVRA] for decisions on their constitutionality to dictate the outcome of the present case," *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995), this Court should determine whether Article I, Section 4's Times, Places and Manner clause gives Congress the power to enact NVRA.

Noting that the Times, Places and Manner power initially belongs to the states, the Ninth Circuit interprets the congressional override provision in Section 4 as giving Congress the power to *interfere* in the state's allocation of its agencies' responsibilities. It holds that the power to "make or alter such Regulations" is a grant to Congress not merely to prescribe its own election laws should it choose to occupy the field, but rather to invade the *state's* sovereign right to establish agencies and their governmental responsibilities as long as the invasion arose from the Congress' elections powers. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995). However superficially appealing such a textual argument is, it simply does not comport with the structure of the Constitution itself. Despite the Ninth Circuit's acknowledgment that the Tenth Amendment defines limitations on Congress' power in accord with this Court's

opinion in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120 (1992) (*Voting Rights*, 60 F.3d at 1415), the Ninth Circuit finds in Article I, Section 4, a broader grant of power to Congress than Congress' plenary power over interstate commerce–in a provision that, by its very language, is primarily a grant of power to the *states*.

After all, Article I, Section 4, grants the power to regulate federal elections to the states in the first instance. The federal government's right to "make or alter" such regulations was designed as a last resort to protect the federal government from state interference with federal elections, not allow the federal government to interfere with the states.

Before ratification of the Constitution, the provision of Section 4 allowing Congress to make and alter election regulations was opposed as giving the national government too much power. Hamilton, however, countered with the argument that "an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy." *The Federalist No. 59*, at 300.

Hamilton understood the interests of the states and the national government as being frequently *at odds*, not *in concert*. While acknowledging that the possibility was slight that the states would bring about the dissolution of the union, Hamilton defended the congressional override provision as insuring the continued viability of the union, to be used by the national authority "whenever extraordinary circumstances might render that interposition necessary to its safety." *Id.* The constitutional argument centered not around whether the *states* should have the power to regulate elections, but on whether the *national government* should be given *any power whatsoever*. Hamilton argued that the provision was necessary as a check on any tendency of a state government to use its Times, Places and Manner power to the detriment of the union. *Id.* at 301. *See also U.S. Term Limits, Inc. v.*

Thornton, 514 U.S. ___, 131 L. Ed. 2d 881, 903-04 (1995). Hamilton framed the issue thus:

> And as it is more consonant to the rules of a just theory to intrust the Union with the care of its own existence, than to transfer that care to any other hands; if abuses of power are to be hazarded, on the one side, or on the other, it is more rational to hazard them where the power would naturally be placed, than where it would unnaturally be placed.

Id. at 300.

Significantly, *Smiley*, on which the Ninth Circuit relied for its expansive interpretation of Congress' Article I, Section 4, powers, noted the way in which the Times, Places and Manner power could be implemented by Congress:

> The phrase "such regulations" plainly refers to regulations of *the same general character* that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, Congress may *supplement these state regulations or may substitute its own.*

Smiley, 285 U.S. at 366-67 (emphasis added). However broadly the Court interpreted the elections power in *Smiley*, there is no indication that it understood them to allow Congress the power to simply invade the internal workings of state government in any manner whatsoever to regulate federal elections.

It is not insignificant that the final decision reached by the Framers was to grant the Times, Places and Manner power to the *states*, in the first instance, and to the national government as a last resort. While the Ninth Circuit stated, consistent with opinions of this Court, that the purpose for Congress' exercising its election powers need not serve the

narrow purpose conceived of by Hamilton--to insure its own preservation (*Voting Rights*, 60 F.3d at 1414), that does not render the Framers' intentions completely devoid of relevance in reviewing Congress' exercise of its "make and alter" power. The Framers set up a federal system vesting limited power, via the Constitution, to the national government, on the one hand, and reserving all other power to the states or the people of the states on the other. After further memorializing this structure in the Tenth Amendment, it is incomprehensible how the Ninth Circuit finds, in the wording of Article I, Section 4's Times, Places and Manner clause, an intent by the Framers to provide to Congress the key which would unlock the door to state sovereignty.

However convenient or natural it seems that an organization such as DMV, or other state agencies which gather and process records of state residents, be utilized for the dual purpose of voter registration, the fact remains that the challenge here lodged by Governor Wilson would be identical had NVRA designated the state highway patrol as the body with which to carry out its mandates. This Court has been appropriately sensitive to the structure of the Constitution, no less than to its substance:

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives--or the hallmarks--of democratic government ....
>
> ....
>
> ... [P]olicy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and,

> with respect to this subject, sets out just how those powers are to be exercised.

Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944-45 (1983). The Ninth Circuit misperceives the Tenth Amendment challenge to NVRA as opposing the *fact* of Congress exercising its supreme power; clearly, Article I, Section 4, gives Congress broad powers to regulate the election of United States Senators and Representatives. However, consistent with the federalism and the Tenth Amendment, the Constitution requires that the federal government exercise this power in a *manner* that does not impinge upon state sovereignty.

III

THIS COURT SHOULD FURTHER DEFINE THE DIVISION BETWEEN STATE AND FEDERAL SOVEREIGNTY CLEARLY EMBODIED IN THE TENTH AMENDMENT

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In upholding NVRA, the Ninth Circuit held that the Tenth Amendment did not bar Congress from "conscript[ing] state agencies to carry out voter registration for the election of Representatives and Senators." *Voting Rights*, 60 F.3d at 1415. The court dismissed Governor Wilson's Tenth Amendment challenge, based on *New York*, determining that Congress' Article I, Section 4, powers were *functionally distinct* from Congress' commerce power. *Voting Rights*, 60 F.3d at 1415.

Further, it held that the Tenth Amendment had *no applicability* with respect to federal regulation of federal elections, however much it intruded into state sovereignty:

> Even though the Act by its terms does not control the practices of voter registration for elections of state and local officials, its impact on such elections probably will be significant.
>
> *It is at this juncture that the sovereignty of the State of California under the Tenth Amendment becomes a constitutional concern.*

Id. (emphasis added). In so holding, the Ninth Circuit construed a limitation upon the Tenth Amendment inconsistent with previous holdings of this Court.

Three years ago, this Court, in *New York*, held unconstitutional the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 as violating the Tenth Amendment to the United States Constitution. *New York*, 505 U.S. at 150. In that case, as in this, the petitioners did not argue that Congress lacked the power to regulate; rather, they "contend[ed] only that the Tenth Amendment limits the power of Congress to regulate in the way it has chosen." *Id.* at 140.

The court below misconstrued the import of *New York*, holding that the limitation iterated there, regarding Congress' commerce powers, did not apply with respect to Congress' Times, Places and Manner power. *Voting Rights*, 60 F.3d at 1415. But the holding in *New York* relied not so much upon an examination of Congress' commerce powers, or even the Tenth Amendment, but on federalism as a fundamental principle upon which the United States was constituted:

> Much of the Constitution is concerned with setting forth the form of our government, and the

> courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 505 U.S. at 158. Contrary to the Ninth Circuit's understanding, *New York* specifically noted that Congress' Article I powers were limited in the *nature* of their exercise regardless of the particular grant of power under which Congress was legislating: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 144. Specifically, this Court enunciated the following principle:

> [N]o Member of the Court has ever suggested that [a strong] federal interest would enable Congress to command a state government to enact state regulation. ... The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id. at 151-52. These principles apply equally as well to petitioners' case. Indeed, because *New York* held that federalism concerns were not an incident of any particular grant of power under the Constitution, but inhered in the

very structure of the Constitution itself, NVRA, albeit enacted pursuant to Congress' Times, Places and Manner power, presents a distinction without a difference. If the Constitution prohibits Congress from forcing state legislatures to legislate, it follows that Congress cannot step into the shoes of the state Legislature and commandeer state agencies simply to do their bidding. Federalism is more than form; "[i]n the tension between federal and state power, lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 115 L. Ed. 2d 410, 423 (1991).

The Ninth Circuit's interpretation of the Tenth Amendment displays other flaws which ought to be addressed by this Court. In acknowledging its sensitivity to the costs and inconveniences associated with implementation of NVRA, the court concedes the possibility that impositions occasioned by its implementation could rise to the level of a Tenth Amendment violation:

> We foresee the possibility in which the district court will be asked to determine whether a certain implementation of the statute sought by the United States ... is properly resisted by the state on *substantial grounds* related to its sovereignty. Should such occasions arise, we would expect the district court to respond with an informed understanding of the duality of sovereignty imbedded within the Constitution of the United States.

Voting Rights, 60 F.3d at 1416 (emphasis added). The concession displays an underlying mistaken premise that sovereignty relies not on the *distinction* between the powers exercisable by the federal or the state government, but on the *degree* to which one power may intrude upon another. In adopting this approach, the Ninth Circuit intimates that sovereignty considerations amount to nothing more than the quantity of state funds being used to implement the federal

scheme. The Framers could hardly have intended that such a vital concept as federalism would be reduced to an accounting function. Justice Powell, dissenting from the holding in *Garcia*, was wary that such notions could ultimately compromise federalism principles:

> [T]he harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. ... Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

Garcia, 469 U.S. at 572 (Powell, J., dissenting). Although *Garcia* spoke to whether federal funding of a local municipal transit system made it subject to federal regulation, Powell's observations are no less apropos to the present case: "Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment." *Id.* at 566 n.10 (Powell, J., dissenting).

The Ninth Circuit ignores the premise, clearly enunciated in *New York*, that is the essence of the Tenth Amendment: States retain their sovereignty despite the powers granted to the national government and despite the supreme stature of Congress' laws. By forcing state agencies to carry out federal prescriptions as to what constitutes good election policy, Congress has ignored the fundamental structure of our republic. Having once admonished Congress not to "cross[] the line distinguishing encouragement from coercion," *New York*, 505 U.S. at 149, this Court should not hesitate to "assume its constitutional responsibility" "to

reconcile [federalism] concerns in the final instance." *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting).

CONCLUSION

In *New York v. United States*, this Court stated, unequivocally, that

> [s]tates are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and inviolable sovereignty."

New York, 505 U.S. at 158 (citation omitted).

Despite this precedent, the lower court upheld NVRA, which requires state agencies to carry out voter registration activities for federal elections. This case raises federalism concerns in a context as yet unaddressed by this Court.

The Ninth Circuit determined that Article I, Section 4, empowers Congress to "conscript state agencies to carry out voter registration for the election of Representatives and Senators" (*Voting Rights*, 60 F.3d at 1415) and rejected the argument based on *New York* that the Tenth Amendment bars the means Congress has chosen to implement its policies. *Id.* To the Ninth Circuit, the power granted to Congress under Section 4 to "make and alter [election] Regulations" is broader than Congress' Commerce power under Section 8.

To clarify the scope of Congress' Article I, Section 4, power and define the protections afforded to state sovereignty

under the Tenth Amendment, this Court should grant the petition for writ of certiorari.

DATED: December, 1995.

Respectfully submitted,

ALAN G. LANCE
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400

CHARLES MOLONY CONDON
Attorney General for the
State of South Carolina
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3970

GRANT WOODS
Arizona Attorney General
1275 West Washington
Phoenix, AZ 85007

* ANTHONY T. CASO
*Counsel of Record
ANNE M. HAWKINS
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, CA 95833
Telephone: (916) 641-8888

JEFFREY R. HOWARD
Attorney General for the
State of New Hampshire
33 Capitol Street
Concord, NH 03301
Telephone: (603) 271-3658

Attorneys for Amici Curiae

No. 95-673

Supreme Court, U.S.
FILED
DEC 26 1995
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETE WILSON, GOVERNOR OF CALIFORNIA,
ET AL., PETITIONERS

v.

VOTING RIGHTS COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

STEVEN H. ROSENBAUM
SAMUEL R. BAGENSTOS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

21 pp

QUESTIONS PRESENTED

1. Whether the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg et seq., is a constitutional exercise of Congress's power under the Elections Clause, U.S. Const. Art. I, § 4, to regulate the manner in which States administer elections for federal office.

2. Whether the NVRA is a constitutional exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-673

PETE WILSON, GOVERNOR OF CALIFORNIA,
ET AL., PETITIONERS

v.

VOTING RIGHTS COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 60 F.3d 1411. The opinion of the district court (Pet. App. 13-25) is reported at 878 F. Supp. 1324.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1995. The petition for a writ of certiorari was filed on October 23, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the State of California's federal constitutional challenge to the National Voter Registration Act of

1993 (NVRA or Act), 42 U.S.C. 1973gg et seq. (Supp. V 1993). The Act is designed to "increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. 1973gg(b)(1) (Supp. V 1993). To that end, it establishes uniform, nationwide procedures for registering to vote in federal elections.

The Act requires States to accept voter registration applications "made simultaneously with an application for a motor vehicle driver's license," 42 U.S.C. 1973gg-2(a)(1) (Supp. V 1993), as well as with applications submitted at the offices of other state agencies, 42 U.S.C. 1973gg-2(a)(3) (Supp. V 1993). The latter agencies must include state public-assistance offices, "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," and other agencies designated by the State. 42 U.S.C. 1973gg-5(a) (Supp. V 1993). The Act also requires state election officials to accept voter registration applications submitted by mail. 42 U.S.C. 1973gg-4 (Supp. V 1993).

The Act also contains provisions to ensure the effective operation of the registration methods just described. It requires the employees of state motor vehicles offices to "include a voter registration application form for elections for Federal office as part of" every driver's license application. 42 U.S.C. 1973gg-3(c)(1) (Supp. V 1993). That voter registration form must inform applicants of the state's voter eligibility requirements and the penalties for submitting a false application; it may not require any information that duplicates information already required on the

driver's license application. 42 U.S.C. 1973gg-3(c)(2)(A) and (D) (Supp. V 1993). When applicants return their completed forms, the motor vehicles employees must forward the voter registration portion of the application to the "appropriate State election official" for processing. 42 U.S.C. 1973gg-3(e) (Supp. V 1993). Employees in the other designated state agencies must also include a federal voter registration form along with every application for the agency's benefits or services, and must forward completed applications to "the appropriate State election official" for processing. 42 U.S.C. 1973gg-5(a)(6) and (d) (Supp. 1993). In all instances, the relevant state election official determines whether the applicant is eligible to vote and makes the ultimate decision whether to place the registrant on the voting rolls. See H.R. Rep. No. 9, 103d Cong., 1st Sess. 8 (1993).

The NVRA contains several provisions protecting the integrity of the voting rolls in federal elections. It requires that voter registration forms set forth each eligibility requirement of state law and require the applicant to attest, under penalty of perjury, that he or she meets each requirement. 42 U.S.C. 1973gg-3(c)(2)(C), 1973gg-7(b)(2) (Supp. V 1993). It also requires States to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" because of the death of the registrant or a change in the registrant's residence. 42 U.S.C. 1973gg-6(a)(4) (Supp. V 1993). In addition, it allows States to conduct a program for removing otherwise ineligible voters from the rolls. 42 U.S.C.

1973gg-6(b) and (c)(2)(A) (Supp. V 1993). Any program to protect the integrity of voter registration rolls, however, must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965," 42 U.S.C. 1973gg-6(b)(1) (Supp. V 1993), and may not purge voters from the rolls "by reason of the person's failure to vote," 42 U.S.C. 1973gg-6(b)(2) (Supp. V 1993). Finally, the Act makes fraudulent registration a federal crime. 42 U.S.C. 1973gg-10(2) (Supp. V 1993).

2. The Act became effective in California on January 1, 1995. See 42 U.S.C. 1973gg note (Supp. V 1993). On August 12, 1994, the Governor of California "order[ed] California state agencies to comply with the NVRA only 'to the extent [that] federal funding is made available for such purposes.'" Pet. App. 14. Because no non-matching federal funding is provided to implement the Act, the Governor's order required total noncompliance. Id. at 3.[1] On December 14, 1994, private plaintiffs filed one of the present actions in the United States District Court for the Northern District of California, seeking declaratory and injunctive relief requiring the State to comply with the Act. Ibid.; see 42 U.S.C. 1973gg-9. Shortly thereafter, the State sued the United States in

---

[1] The United States Departments of Agriculture and Health and Human Services have provided matching funds for the States' costs of implementing the NVRA with respect to applicants for benefits under the AFDC, WIC, and food stamps programs. See H.R. Rep. No. 9, supra, at 11 (expressing intent that such matching funds be provided). In addition, the NVRA provides for reduced postal rates for mailings required by the Act. See 39 U.S.C. 3629 (Supp. V 1993); see also 42 U.S.C. 1973gg-6 note (Supp. V 1993). In the absence of state expenditures, however, the Act does not provide for federal funding of the NVRA's implementation.

the same court, seeking a declaration that the Act violates the federal Constitution and an injunction barring its enforcement. Pet. App. 15. The United States filed a counterclaim in the State's action, seeking an injunction to require the State to comply with the Act. Ibid. After the two actions were consolidated, the parties moved for preliminary injunctions. Ibid. The district court consolidated the preliminary injunction hearing with a trial on the merits of the constitutional issues. Ibid.; see Fed. R. Civ. P. 65(a)(2).

After trial, the district court issued a written decision rejecting the State's constitutional challenges to the Act. Pet. App. 13-25. The court held that the NVRA is a valid exercise of Congress's power under the Elections Clause, U.S. Const. Art. I, § 4, to regulate the "Times, Places and Manner of holding" elections for federal office. Pet. App. 16-19. The court also held that the Act does not violate the Tenth Amendment since, when acting under the Elections Clause, Congress "may directly regulate the state's manner and means of voter registration without invading an area reserved to the states." Id. at 18. The court permanently enjoined the State from failing to comply with the Act and ordered it to come forward with "a proposed plan for implementing the NVRA." Id. at 21.

3. The court of appeals affirmed. Pet. App. 1-12. Relying in part on the Seventh Circuit's decision upholding the Act in Association of Community Organizations for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (1995), the court determined that Congress's

power over the "Times, Places and Manner of holding" elections for federal office includes the power to regulate voter registration procedures. Pet. App. 5. Based on that determination, the court held that "the Act * * *, on its face, fits comfortably within" Congress's power under the Elections Clause. Id. at 7.

The court of appeals rejected the State's argument that the NVRA violates the Tenth Amendment principles articulated in New York v. United States, 505 U.S. 144 (1992). The court observed that New York held that "Congress could not impose on the states the burden of exercising its power under the Constitution to regulate interstate commerce." Pet. App. 8. The court determined that the State's reliance on New York was "flaw[ed]," because, "unlike the commerce power in Article I, section 8," the Elections Clause "empowers Congress to impose on the states precisely the burden at issue." Pet. App. 8.

The court of appeals emphasized that its decision concerned "an as yet unapplied statute." Pet. App. 4. The court assumed that "interpretive or constitutional issues that might arise in the implementation of the Act do not impair our analysis of the Act's facial constitutionality." Ibid. As had the Seventh Circuit in ACORN, the court directed the district court "to approach its task of implementation with an 'adequate sensitivity to the principle of federalism.'" Pet. App. 12 (quoting ACORN, 56 F.3d at 798). The panel retained jurisdiction to consider any subsequent appeals. Pet. App. 12.

ARGUMENT

The court of appeals correctly held that the NVRA is a valid exercise of Congress's power under the Elections Clause (U.S. Const. Art. I, § 4) and does not violate the Tenth Amendment. The Ninth Circuit's decision accords with the only other court of appeals decision to address the constitutionality of the Act, Association of Community Organizations for Reform Now (ACORN) v. Edgar, 56 F.3d 791 (7th Cir. 1995), and with all of the district court decisions addressing that subject.[2]

1. The court of appeals correctly held that Congress had the power to enact the NVRA under the Elections Clause, U.S. Const. Art. I, § 4. See Pet. App. 7; accord ACORN v. Edgar, 56 F.3d at 793-795. That Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.[3]

A natural reading of the term "Manner of holding Elections"

---

[2] ACORN v. Miller, Nos. 4:95-cv-45, 1:95-cv-184 & 1:95-cv-386 (W.D. Mich. Dec. 13, 1995); Condon v. Reno, Civ. Nos. 3:95-192-0 & 3:95-345-0 (D.S.C. Nov. 20, 1995); Virginia v. United States, No. 3:95CV357 (RLW) (E.D. Va. Oct. 18, 1995); ACORN v. Ridge, Nos. Civ. A. 94-7671 & Civ. A. 95-382, 1995 WL 136913 (E.D. Pa. Mar. 30, 1995); see also League of Women Voters v. Graves, No. 95-2350-KHV (D. Kan. Nov. 30, 1995) (granting preliminary injunction requiring Kansas to comply with NVRA).

[3] The Elections Clause does not refer to presidential elections. As the Seventh Circuit observed, however, this Court has construed Article II, Section 2, which does address that subject, "to grant Congress power over Presidential elections coextensive with that which Article I section 4 grants it over congressional elections." ACORN v. Edgar, 56 F.3d at 793 (citing Burroughs v. United States, 290 U.S. 534 (1934)); see also Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1976).

includes the process of registering voters. As this Court stated in Smiley v. Holm, 285 U.S. 355, 366 (1932):

> [T]hese comprehensive words ["Times, Places and Manner"] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

See also Ex parte Siebold, 100 U.S. (10 Otto) 371, 379-380 (1880) (upholding a statute providing for federal supervision of a state's voter registration process as a proper exercise of the "Times, Places and Manner" authority); ACORN v. Edgar, 56 F.3d at 793 ("Times, Places and Manner" includes process of registration). Thus, the NVRA's adoption of uniform, nationwide procedures for registering to vote in elections for federal office falls squarely within the scope of the Elections Clause.

By virtue of the Elections Clause, the conduct of federal elections is "one of the few areas in which the Constitution expressly requires action by the States." U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1855 (1995). The Elections Clause provides "that the state legislatures 'shall' prescribe the details necessary to hold congressional elections." Id. at 1883 (Thomas, J., dissenting) (quoting U.S. Const. Art. I, § 4); see also Siebold, 100 U.S. (10 Otto) at 388 ("It is the duty of the States to elect representatives to Congress."). As the court of appeals held, that obligation is one that the Constitution contemplates the

States will bear at their own expense. Pet. App. 9; accord ACORN v. Edgar, 56 F.3d at 794.

Although the States have the initial obligation to set up procedures for elections for federal office, Congress has "ultimate authority" over federal election procedures. U.S. Term Limits, 115 S. Ct. at 1899 (Thomas, J., dissenting). Thus, even when States prescribe their own procedures, Congress retains "a general supervisory power over the whole subject." Siebold, 100 U.S. (10 Otto) at 387. The Clause expressly empowers Congress "at any time" to "make" its own regulations or to "alter" the States' regulations. As this Court has explained (Siebold, 100 U.S. (10 Otto) at 383-384):

> If [Congress] only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it.

It is clear that, when Congress "alters" a State's rules, the state officials remain responsible for carrying them out.[4] That is also true when Congress makes its own rules, for state officials owe duties "as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, --

---

[4] See ACORN v. Edgar, 56 F.3d at 795:

> The first sentence [of the Elections Clause], remember, requires the states to create and operate * * * a system [for electing federal officials] and the second authorizes Congress to alter the state's system -- but it is still the state's system, manned by state officers and hence paid for by the state.

State and national." Id. at 388. In the NVRA, Congress made its own rules, and those rules "alter" any inconsistent state rules on the subject. See ACORN v. Edgar, 56 F.3d at 795. And, in keeping with this Court's understanding of the Elections Clause, Congress required the States to administer those rules.

The NVRA is not only consistent with this Court's understanding of the Elections Clause but also with historical practice. Each time Congress has regulated federal elections, it has compelled the States to implement those regulations. For example, since 1871 Congress has required that all elections for Members of Congress be tabulated by written or printed ballot. See 2 U.S.C. 9. And since 1872 Congress has established a uniform, nationwide date on which States must hold elections for federal office. See 2 U.S.C. 7; 3 U.S.C. 1. Those enactments have required States to develop and implement procedures for tabulating, securing, and printing ballots, and to provide for polling places on the federally mandated election date. They have also put States to the choice of either electing state officials by ballot on the federal election date or incurring the additional expense and effort of administering separate processes for state and federal elections. The constitutionality of such federally mandated burdens is firmly established. Ex parte Yarbrough, 110 U.S. 651, 661 (1884); Siebold, 100 U.S. (10 Otto) at 384. This Court has also upheld the federal requirement that States establish a mechanism for accepting absentee ballots in presidential elections. Oregon v. Mitchell, 400 U.S. 112, 118-119 (1970) (opinion of Black, J.) (upholding 42

U.S.C. 1973aa-1(d)).

Petitioners suggest that the Elections Clause "was solely designed to allow Congress to regulate federal elections in 'extraordinary circumstances' to prevent the States from refusing to conduct federal elections." Pet. 26 (quoting The Federalist No. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); see also Washington Legal Foundation et al. Amicus Br. (WLF Br.) 11-13; Pacific Legal Foundation Amicus Br. (PLF Br.) 11-13. One important purpose of the Clause was, indeed, to prevent States from destroying the Union by refusing to hold elections for federal office. See The Federalist No. 59, at 363. But the court of appeals correctly determined that the Clause was not limited to that purpose. Pet. App. 7-8 & nn.3-4.

As the Seventh Circuit observed in ACORN v. Edgar, the Elections Clause "is broadly worded and has been broadly interpreted." 56 F.3d at 794. The Clause authorizes Congress to exercise its supervisory authority over federal election procedures "at any time," U.S. Const. Art. I, § 4, not just when necessary to preserve the Union. See Siebold, 100 U.S. (10 Otto) at 392 (Elections Clause power may be exercised "whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State"); see also Smiley, 285 U.S. at 366-367. As the Seventh Circuit noted (ACORN v. Edgar, 56 F.3d at 794), "[o]ne of the unquestioned regulations enacted under the authority of Article I section 4 is the fixing of a uniform date for federal elections" -- a regulation that can hardly be said to be necessary for the

preservation of the Union. The NVRA is a valid exercise of Congress's "coordination function." U.S. Term Limits, 115 S. Ct. at 1898 (Thomas, J., dissenting).

2. Relying on New York v. United States, 505 U.S. 144 (1992), petitioners contend (Pet. 18-23) that the NVRA violates the Tenth Amendment by requiring state officials to implement its provisions. See also WLF Br. 7-9; PLF Br. 16-20. The court of appeals, like all other courts to consider the issue, correctly rejected that contention. Pet. App. 8-9.

In New York, this Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842, violated the Tenth Amendment. That provision was enacted pursuant to Congress's Commerce Clause power, and it required States either to enact regulations providing for the disposal of all low-level radioactive waste generated within their borders or to take title to and possession of that waste by January 1, 1996. This Court held that the provision violated the principle that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" New York, 505 U.S. at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)). The Court explained that "[t]he allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." New York, 505 U.S. at 166.

The Tenth Amendment principles enunciated in New York are inapposite here. The Tenth Amendment provides (U.S. Const. Amend. X):

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Tenth Amendment reserves to the States only "the original powers of sovereignty" that they possessed before adoption of the Constitution. U.S. Term Limits, 115 S. Ct. at 1854. The power to regulate the "Times, Places and Manner" of holding elections for Congress and the presidency, however, "exclusively spr[a]ng out of the existence of the national government." Ibid. That power, moreover, is expressly "delegated to the United States" (U.S. Const. Amend X) by the Elections Clause. It is therefore not a "power[]" reserved to the States by the Tenth Amendment.[5]

The textual allocation to the States of the authority and obligation to administer the federal election machinery reflects the Framers' recognition that "manifest convenience requires" leaving to the States the general responsibility for conducting elections for federal office. Siebold, 100 U.S. (10 Otto) at 383. But the Framers also recognized the strong federal interest in regulating the conduct of federal elections. See Wesberry v. Sanders, 376 U.S. 1, 42 (1964) (Harlan, J., dissenting). Thus,

---

[5] Even if the Tenth Amendment did limit Congress's exercise of its Elections Clause authority, the NVRA would fall within those limits. Unlike the situation in New York, in the NVRA Congress did not force States to exercise a congressional power to regulate private conduct. Cf. New York, 505 U.S. at 166. Rather, Congress exercised its long-standing authority to supervise the States' own conduct in administering elections for federal office.

they expressly required state officials to comply with congressional regulations in this area. Congress may exercise this power "at any time, and to any extent which it deems expedient." Siebold, 100 U.S. (10 Otto) at 392.

If petitioners were correct that Congress may not impose affirmative obligations on States as part of its power to "make or alter" regulations of the federal election process, Congress would be required to federalize the entire voter registration process whenever it wished to impose some uniform federal requirements on that process. Cf. WLF Br. 10. The Court has squarely rejected that argument: "We are unable to see why it necessarily follows that, if Congress makes any regulations on the subject, it must assume exclusive control of the whole subject. The Constitution does not say so." Siebold, 100 U.S. (10 Otto) at 383.[6] While Congress has traditionally left "the general organization of the polls to the State" (ibid.), it has always retained the "supervisory and paramount" power that the Framers deemed essential to the preservation of the federal government (id. at 386). The decision in New York did not purport to change those well-established

---

[6] Petitioners read (Pet. 25) Siebold as standing only for the limited proposition that Congress may attach additional penalties to voter fraud committed by state officials in federal elections. The holding of Siebold is not so limited. Siebold upheld a federal statute that provided for the appointment of federal officers to supervise state officials in the registration of voters, administration of voting rolls, and staffing of polling places in elections for federal office. See Siebold, 100 U.S. (10 Otto) at 379-382. The Court held that Congress may subject state officials to this kind of federal supervision because, in the area of federal elections, state officials owe duties to the United States as well as the State. Id. at 388.

principles.

3. Despite Congress's broad power to regulate federal elections, petitioners contend that the NVRA violates principles of federalism because it requires employees of the state Department of Motor Vehicles and public assistance agencies "to perform federal registration duties wholly outside their usual line of work." Pet. 22 (internal quotation marks omitted). That contention is factually incorrect. Under the Act, it is the "appropriate State election official" -- as designated by state law -- who registers voters, determines eligibility, and maintains the voter rolls. 42 U.S.C. 1973gg-3(e), 1973gg-5(d); see also H.R. Rep. No. 9, 103d Cong., 1st Sess. 8 (1993). The Act imposes only narrow, routine duties on employees at other state agencies: They must include voter registration forms with the driver's license or social service applications they already distribute, see 42 U.S.C. 1973gg-3(c), 1973gg-5(a)(6) (Supp. V 1993); they must provide assistance in filling out the forms when asked, see 42 U.S.C. 1973gg-5(a)(6)(C) (Supp. V 1993); and they must forward the completed forms to the "appropriate State election official," 42 U.S.C. 1973gg-3(e), 1973gg-5(d) (Supp. V 1993). None of those duties is alien to the affected employees' "usual line of work." They must, in all events, distribute forms (for driver's licenses or other state benefits or services) and forward them for processing; at most, the Act adds an additional form to the package.

Those minimal additional duties are closely related to Congress's power under the Elections Clause to adopt uniform

procedures for electing federal officials. See ACORN v. Edgar, 56 F.3d at 796 (noting that Congress might exceed its authority under the Elections Clause if it sought to use that power "to destroy state government, perhaps by constituting all employees of the state full-time federal voting registrars," but that the NVRA does not impermissibly interfere with state prerogatives). When it enacted the NVRA, Congress acted against a backdrop of voter registration procedures that varied widely from State to State. For example, only 27 States offered registration by mail. See S. Rep. No. 6, 103d Cong., 1st Sess. 12 (1993). Twenty-two States permitted voter registration at motor vehicles offices, but the programs were implemented in different ways. See id. at 7-10. State laws allowing voter registration at other state agencies were also inconsistent. See id. at 15. Congress decided to make these procedures uniform, and it decided to do so in a way that afforded broad opportunities to register to vote. See U.S. Term Limits, 115 S. Ct. at 1858-1859, 1864 (noting that constitutional provisions governing federal elections aim at promoting uniformity). It therefore endorsed the procedures adopted by States that afforded such broad opportunities, and adopted those procedures as national rules. Doing so requires some employees in some States to assume obligations not imposed under current state practice; that, however, is a necessary concomitant of Congress's "coordination function" under the Elections Clause. Id. at 1898 (Thomas, J., dissenting).

The present cases entail only a facial challenge to the NVRA.

Pet. App. 4. The court of appeals recognized that future applications of the Act might raise constitutional issues distinct from those presented here. Id. at 4, 11. The court also recognized that the prospect of such issues arising "dictate[s] that implementation of the Act be done sensitively." Id. at 9; accord ACORN v. Edgar, 56 F.3d at 798 (implementation of NVRA must "exhibit an adequate sensitivity to the principle of federalism"). Accordingly, the court of appeals specifically directed the district court on remand to act "with an informed understanding of the duality of sovereignty imbedded within the Constitution of the United States." Pet. App. 11. In addition, the panel retained jurisdiction over any later appeals involving implementation. Id. at 12. In light of those actions, petitioners' claim that implementation of the Act will encroach on state prerogatives does not justify further review by this Court at this time. See Watson v. Buck, 313 U.S. 387, 402 (1941) ("Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.").

4. Petitioners also urge this Court to grant certiorari to consider whether the NVRA is a valid exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments. Pet. 27-29. While Congress's enforcement power under those Amendments provides an alternative ground for upholding the judgment below, that issue was not decided by the court of appeals. In any event, the Act is

a proper means of enforcing the Fourteenth and Fifteenth Amendments.

The enforcement provisions of the Fourteenth and Fifteenth Amendments authorize Congress to "use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966); accord Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). In the exercise of that authority, Congress may adopt uniform, nationwide rules targeting practices with a discriminatory effect. See Oregon v. Mitchell, 400 U.S. at 132-133 (opinion of Black, J.) (upholding nationwide ban on literacy tests); id. at 216 (opinion of Harlan, J.) (same); id. at 283-284 (opinion of Stewart, J.) (same); see also City of Rome v. United States, 446 U.S. 156 (1980) (Congress may take action against practices that are discriminatory in effect, even if they lack a discriminatory purpose).

Under that principle, the NVRA is well within Congress's enforcement authority. Congress enacted the NVRA after nearly 30 years of experience with the Voting Rights Act and a decade of investigating voter registration procedures. See, e.g., Staff of Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong., 2d Sess., After the Voting Rights Act: Registration Barriers (Comm. Print 1984) (H.R. Ser. No. 18). That experience revealed that voter-registration requirements have sometimes been administered in a way designed to deprive minorities of their right to vote. See, e.g., S. Rep. No. 6, supra, at 3, 18; H.R. Ser. No. 18, supra, at 2-5. Congress also considered evidence

that existing registration practices have had discriminatory effects. See, e.g., S. Rep. No. 6, supra, at 17-18. The NVRA responds to those problems by enacting uniform, nationwide procedures that tend to prevent discriminatory administration of registration laws and make it easier to register. Such uniform rules can be an effective way to enforce the Fourteenth and Fifteenth Amendments. See Oregon v. Mitchell, 400 U.S. at 283-284 (opinion of Stewart, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

STEVEN H. ROSENBAUM
SAMUEL R. BAGENSTOS
Attorneys

DECEMBER 1995